CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *Jan.* 1822.

EASTERN DISTRICT, JANUARY TERM, 1822.

WARD *vs.* BRANDT & AL.

Former judgment amended.

WARD vs. *BRANDT & AL.*

APPEAL from the court of the first district.

PORTER, J. When this case was formerly before us, we reversed the judgment of the district court, being of opinion that the evidence did not support the allegation of the plaintiff being a creditor of the defendants.

A rehearing has been granted, and the parties have since declared that their intention in referring to the record in the case of *Brandt & Co.* vs. *their creditors*, was not only to establish that they had obtained a respite, but also to prove any other fact of which it offered legal evidence; a consent to that effect entered into previous to the hearing, which

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was not among the papers handed to the court when the cause was first examined, has also been laid before us.

The evidence now presented, shews satisfactorily that the defendants were indebted to the plaintiff at the time this action was commenced. I therefore think that the judgment of the district court ought to be affirmed with costs.

MARTIN, J. I concur in judge Porter's opinion.

MATHEWS, J. I do likewise.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Greyson for the plaintiff, *Derbigny* for the defendants.

GAILLARD vs. *ANCELINE.*

APPEAL from the court of the parish and city of New-Orleans.

After a justice is out of office, he cannot certify any proceedings theretofore had before him.

PORTER, J. On the trial of this cause in the court below, the defendant offered in evidence, copies of declarations of certain wit-

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nesses taken before one Gourjon, a justice of the peace for the city of New-Orleans, in the year 1811, which were admitted by the court, to prove that heretofore the slavery of the defendant had been questioned.

These declarations were certified by Gourjon many years after he had ceased to be a justice of the peace; and the plaintiff objected to their introduction, on the ground that as he was no longer acting in that capacity, his authority had expired to give certified copies of what took place before him while in the exercise of his functions as magistrate.

This presents for decision the question as to that authority, and I am of opinion that the judge *a quo* erred in deciding that it sanctioned the reading of these declarations in evidence.

A person who is no longer a public officer has no more right to give copies of papers than any other individual. Faith and credit is attached to his certificate, when it makes a part of, and is given in, the discharge of the duties appertaining to the office he holds, because the law presumes it is given under the responsibility attached to that situation, and with reference to the obligations that flow from it. But that presumption no longer ex

ists when the individual ceases to act in that capacity.

The judge below in refusing the motion made for a new trial, noticed this objection, but seemed to consider it unnecessary, to have the cause tried again on this account, as the fact established by the declarations alluded to, was immaterial to the point at issue between the parties. I have great difficulty in coming to that conclusion in a case of this kind, where the evidence was so very contradictory. The fact of frequent claim of freedom may have had an influence on the minds of the jury, and that influence should not have been communicated but through legal proof. 16 *Johns.* 89.

I conclude therefore, that this cause should be remanded for a new trial, with directions to the parish judge not to receive in evidence copies certified by Gourjon, of proceedings had before him while justice of the peace.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided

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and reversed, and the case be remanded, with directions to the judge not to receive in evidence the copies certified by Gourjon, of proceedings had before him while justice of the peace.

Denys for the plaintiff, *Smith* for the defendant.

BERNARD & AL. vs. *VIGNAUD.*

A father-in-law is not incapacitated from being a witness.

APPEAL from the court of the first district.

This case was determined in July term, 1820, it was not printed with those of that term, a rehearing having been granted, when they were committed to press. 8 *Martin*, 483.

MARTIN, J. then delivered the opinion of the court.*

The plaintiffs have established, that Fouque, the defendant's vendor, was appointed their testamentary tutor by their surviving parent; that he accepted the trust, appears by the inventory, an authentic instrument, in which he takes the title of tutor. This circumstance, we consider as conclusive evidence of his acceptance of the trust. Our

* MATHEWS, J. was absent.

statute expressly provides, that a succession is accepted expressly when the heir assumes the quality of such, in some authentic or private instrument, or in some judicial proceeding. *Civ. Code*, 162, *art.* 77. A succession is accepted tacitly, when some act is done by which the intention of being heir might necessarily be supposed, *id.* The principle here must be the same, as *ubi eadem est ratio eadem est lex.* We find Fouque's express and tacit acceptance of the tutorship; for he assumes the quality or title of tutor, by subscribing an act, in which it is given him; his assistance as tutor to the inventory, must be presumed to have had in view the giving faith and regularity to the inventory, to which the law imperatively demands the presence of the tutor. Hence the presence of Fouque is an act from which his intention to be tutor must be necessarily supposed.

From the date of the inventory, his property was tacitly bound. The property of the tutor is tacitly mortgaged in favour of the minor, from the day of the appointment of said tutor, for the security of his administration, and the responsibility which results from it. *Id.* 72, *art.* 75.

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Fouque was appointed tutor by the will of the plaintiffs' mother. The date of that instrument is not the period at which the responsibility begins; for the will itself had no validity till the death of the testatrix. Whether on the tutor's acceptance, this responsibility does not begin, by relation, on the day of the death of the person appointing him, is not a question necessary to be examined in this case. Being of opinion that the presence at, and subscription of the inventory, is an act which evinces the intention to accept; the acceptance must be considered by us as complete on that day. On the seventh day of December, the responsibility of Fouque began, and the tacit lien attached on his property. The defendant, who afterwards, *to wit*, on the 22d of June, 1811, purchased Fouque's slaves, acquired them *cum onere*.

The plaintiffs have shewn, by the highest legal evidence, the record of a suit, in which they obtained judgment against Fouque, their tutor, that he is indebted to them in that capacity. They have, therefore, completely shewn, that the slaves purchased by the defendant from Fouque, are bound for the payment of their claim.

The defendant contends, that the presence of Fouque at, and his subscription on the inventory, was not an administrative, but only a preparatory act, which did not give rise to a tacit lien on his estate. There cannot be any doubt that the law which requires the presence of the tutor, at the inventory, imposes on him the obligation to see that it be faithfully made; and consequently, renders the tutor liable to indemnify the minor, in case any loss ensues from the tutor's negligence or collusion. If, therefore, in the present case, Fouque had sanctioned an inventory, in which a part of the estate was omitted, he incurred a responsibility, and his estate was *ipso facto* bound.

The 3d *sec.* of the act of 1813, *ch.* 49, 1 *Martin's Dig.* 704, *n.* 3, expressly provides, that minors shall not lose the benefit of their tacit lien on the estate of their tutors, although there may not be any record of it.

Fouque having neglected to take the oath, and give the security which the law requires from all tutors, except those by nature, to provoke the appointment of an under-tutor, or take letters of tutorship, are circumstances which cannot alter the extent or nature of his liability.

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It does not appear to us that the district court erred in rejecting Fouque, when he was offered as a witness by his son-in-law. The law excludes ascendants.

The affinity of one of the married persons with relations to the other, is reputed to be in the same line and degree in which they are related to the latter. 1 *Pothier, Marriage*, 151.

So, the affinity of the defendant with Fouque is in the first degree of the ascending line.

The plaintiffs' judgment against Fouque was proper evidence in the present case; the law requires the mortgagor to obtain judgment against the mortgagee, when the property is in the hands of third persons.

The judgment of the defendant against the syndics of Fouque is evidence of his claim.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that judgment be entered in favour of the plaintiffs and appellants, for the amount of their claim, as stated in the judgment against Fouque, *to wit*: first, for the sum of $3584 38 cents, with legal interest thereon, from the 2d of July, 1812, till paid;—secondly, also interest upon the further sum of $1265 62 cents, from

the 2d of July, 1812, to the 22d of July, 1813; thirdly, also interest upon the further sum of $1050, from the 2d of July, 1812, to the 20th of May, 1814; and—fourthly, for the sum of $53, being the amount of costs in the suit against Fouque, together with costs in both courts. And it is further ordered, adjudged and decreed, that if the defendant and appellee does not pay and satisfy the amount of this judgment, within ten days from its notification, the slaves mentioned in the petition, be sold, or so much of them as will be sufficient.

A rehearing was afterwards applied for by the defendant in the whole case; but as the part of the application which relates to the admissibility of the defendant's father-in-law as a witness, constituted the principal and rather the only difficulty, the rest is not published.

Livingston, for the defendant. Fouque is supposed to have been properly rejected, because he is the father of the plaintiffs' wife, under the *Civ. Code*, 312, *art.* 248. The first part of this article declares, that all persons above 14 years of age, free, of a sound mind, and not rendered infamous, may be witnesses

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of any fact; provided, that such persons be not directly or indirectly, interested in the cause. Then follow these other provisions. The husband cannot be a witness for or against the wife, nor the wife for or against the husband. Neither can ascendants with respect to their descendants, nor descendants with respect to their ascendants.

No other objection is here made, but that the witness offered, came within the last clause of incompetency—that he was an ascendant; and of this opinion was the court: for all they say on this subject is to quote the words of *Pothier*. "The affinity of one of the married persons with the relations of the other, is reputed to be of the same line and degree in which they are related to the other."

I apprehend, that the court will find that this part of the decision at least, demands reconsideration.

Our law is express: if Fouque was not the ascendant of Vignaud, he ought not to have been excluded. The court say, that he is an ascendant, because he is the father-in-law, or in other words, the father of the plaintiffs' wife.

What is an ascendant, or its co-relative, descendant, in the sense in which they are em-

ployed by our law? They may be defined, those who are related by consanguinity, in the direct ascending or descending line.

This definition by the term consanguinity, excludes the relations by affinity, and by the terms direct, excludes collaterals.

Let us see whether my definition is not supported by every passage in which the terms are used in our *Code*, or in the laws from which it was compiled.

En derecho se conceptuan tres lineas de succession; una de descendientes, que son los hijos, nietos, visnietos, y todos los que descienden y provienen unos de otros, como cadena hasta lo infinito. Otra de ascendientes y son padres, abuelos, visabuelos, y demas que retrociendiendo suben y se eucuentran pasto Adam; primer progenitor y padre del linage humano. Febrero de part. lib. 2, c. 7, sec. 1, n. 2.

Muriendo algun intestado, le suceden solamente los hijos como los mas immediatos consanguinos. Id. n. 3.

Here we find, that by the Spanish law, the terms used are the same with those adopted by our *Code*, and that they are defined to mean what I have said, a direct ascending or descending consanguinity.

The English law uses nearly the same

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terms in the same sense: "lineal consanguinity is that which subsists between persons who are descended from each other in a direct line." 2 *Bl. Com.* 203.

For the French law, take the author quoted by the court. *La parenté que chaque personne peut avoir avec ses differens parents se divise en trois lignes; la dircete ascendante, la directe, descéndante et la collaterale. La parenté de ligne directe descendante est celle que j'ai avec ceux qui descendent de moi; celle de la ligne directe ascendante, est celle que j'ai avec ceux de qui je descends. Poth. Traité des Successions, ch.* 1, *sec.* 2, *art.* 3.

Now, as no man can be said to have descended from his wife's father, and as this descent is made essential, by *Pothier's* definition, to the relationship in the ascending or descending line between the parties, it would seem, that this accurate writer had made a false definition in the part I quote, or laid down false law, in that quoted by the court. But some attention to the context will remove every difficulty. The passage cited by the court is taken from his treatise on marriage. The second article, in which it is contained, treats of the obstacles which arise to a legal marriage from affinity. The title of the sec-

tion is—*What is affinity?* And this enquiry is one of a series of enquiries and definitions, which, according to this author's usual method, he lays down, in order to determine what degree of affinity will, according to the laws of France, prevent a marriage from being legal.

He defines affinity to be, the relation in which the wife stands to the relations of the husband, or the husband to those of the wife. So, that all the blood relations of the wife are *affins* (a word which we want in our jurisprudence) of the husband, and *vice versa* those of the husband are the *affins* of the wife. We then come to the passage in question, *n.* 151. The whole reads thus, "although, properly speaking, there are neither lines nor degrees in affinity, the relations by affinity (*les affins*) not descending from the same stock, *gradus affinitatis nulli sunt.* Yet in a less proper sense, we distinguish in it both lines and degrees." Then we have the member of the article quoted by the court, "the *affinity* of one of the married persons, with the relations of the other, is reputed to be of the same line and degree in which they are related to the latter." The whole of this clearly shews, that the object of

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the author is merely to enquire what relation of affinity will bar a marriage; but as there are properly no degrees or lines of affinity, it would be difficult to mark the degree of propinquity that would have this effect. Therefore the degrees of affinity of the wife, are measured by the degree of consanguinity, in which the person stands to the husband; and the law is then enabled to apply its prohibitions to this scale.

But, if an ascendant must have consanguinity with his descendant, of what use is it to enquire by what degrees affinity is to be marked or counted. And *Pothier*, even in the part relied on by the court, only speaks of the manner of affinity; but because a man stands with respect to another in the first descending degree of affinity, does it follow that he is his descendant?

A short review of the obvious meaning of the term, whenever employed in our law, will answer the question. *Civ. Code*, 146. There are three classes of legal heirs, *to wit:* The children, and other lawful descendants; the fathers and mothers, and other lawful ascendants; and the whole collateral kindred.

"The nearest relation in the descending,

ascending, or collateral line, conformable to the rules hereafter established, is called to the legal succession."

It requires but little argument, I believe, to shew, that in these passages (and I refer to the whole title of successions) the terms, ascendant and descendant, are used to mean a direct descent by consanguinity, to the exclusion of relations by affinity. Otherwise, if the doctrine be true, that a relation by affinity, is the same as a relation by consanguinity.— If a man should die, leaving a father and mother, and the father and mother of his wife be alive, they will all inherit equally; and thus a man may leave four relations in the first degree, in the ascending line; or in other words, two fathers and two mothers. First consequence of the doctrine.

If a man die without descendants, leaving a grandfather and grandmother, the father and mother of his wife will exclude them from the succession, for the nearest in degree excludes the others, and the grandfather and grandmother can never inherit while the father and mother are alive. Second consequence.

No man, whose wife's mother or father is alive, can dispose of more than one-third of

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his property, although he have no children.—Third consequence.

A man, by marrying four or five wives in succession, secures to himself a child's portion in the estate of each of the families, because he becomes a descendant of each of his fathers-in-law. Fourth consequence.

In short, the whole law of succession would be overthrown and confounded. And I pray the court to examine every other passage in the *Code*, and in our laws, in which these terms, ascendant and descendant, are used; and I think they will find that there is not one in which they can give it any other meaning than a relation by consanguinity. If this be so in every other passage, why should this form an exception? The *Code* declares, that words are to be understood in their most usual signification. Now, I think, without requiring any thing for my client, I may put his cause on the issue, that no one case in any book or language, or any law, can be found, in which the term ascendant, was used to signify a relation by affinity. And I am bound in defence of my client to say, that I think the court has no right to give any other sense to the words of the legislature, than that in which

they have uniformly employed them, particularly when by doing it, they extend the rules for the exclusion of witnesses, who would otherwise be competent.

The rehearing was granted.

Seghers, for the plaintiffs. This is an action *in rem*, brought principally against the slaves, on which we claim our tacit lien; and in a subsidiary manner, only against the defendant, their actual possessor.

It is in evidence that the wife of the defendant is the daughter of the witness, and that she had married him long before he bought those slaves from the witness.

Though the sale was executed in the husband's name only, yet the wife is entitled to one half of them. *Civil Code*, 336, *art.* 63, 64.

The witness therefore, were he admitted, would give evidence in favour of his daughter, and eventually in his own, because, were his daughter to die without issue, he is her forced heir.

This observation would suffice to justify the decision of the district judge, in rejecting the witness. But we expect to shew that the exclusion pronounced by the *Civil Code* extends to the *affins*, as well as to the *consanguinei*.

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By the statutes of this state, these exclusions or incapacities are threefold, *viz.* that of intermarrying; that of judging; and that of standing as witness; and in this they agree with the Spanish, as well as with the French and Roman laws.

Our statute provides, that marriage between persons related to each other, in the direct ascending or descending line, is prohibited; and this prohibition is not confined to legitimate children, but extends to children born out of marriage, 124, *art.* 9. And among collateral relations, marriage is prohibited between brother and sister, whether of the whole or of the half blood; whether legitimate or illegitimate; and also between the uncle and the niece, the aunt and the nephew. *Id. art.* 10.

Now, the Spanish law, *Partida* 4, 6, 4, says, "in the degrees of the direct ascending or descending line, marriage can never be contracted, how distant soever be the degree; but in the collateral line, marriage may be contracted beyond the fourth degree." Whether the connections are included in this prohibition, will appear by the 5th law of the title. "When a man contracts a carnal union

with a woman, whether he be married with her or not, by this union, all her relations become the connections of the man, and likewise all his relatives become the connections of the woman; and by reason of such an alliance as this, if any of those from whose union it sprung, should die, the following obstacle would arise—that the surviving person could not marry with any of the relatives of the deceased, within the fourth degree inclusive, in the same manner as in kindred." And *Gregorio Lopez*, on this law observes, that "the obstacle would be perpetual between the connections in the ascending and descending line."

The provisions of our *Code* are the same as those of the *Partida* just quoted, except, that the prohibition has not the same extension in degrees; and as the fifth law contains nothing contrary to, or irreconcilable with, the said provisions, we maintain, that they are to be explained by this law, which is still the law of the land.

The doctrine laid down in this law, is likewise held by *Rodriguez*, in his *Digesto teorico-practico*, 38, 11. "Affinity is a species of kindred established by the civil law, between

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the husband and the relatives of his wife, and between the latter and the relatives of her husband. And the degrees of affinity in which the wife stands to her husband's relatives, are the same as the degrees of consanguinity in which he stands to them, and *vice versa*. So, that the husband stands in the second degree of affinity to the sister of his wife. But it must be understood, that the husband and wife contract no affinity between themselves; consequently, there is no affinity between their respective relatives. The affinity arising from marriage, extends to the fourth degree inclusive." In the same title we find the Roman law on which this doctrine is founded. *Dig.* 38, 11, 4 (which, in the *Corpus Juris Civilis*, is 38, 10, 4.)

No. 4. The names of the connections are, father-in-law, mother-in-law, son-in-law, daughter-in-law, step-father, step-mother, step-son, step-daughter. No. 7. Between these marriage is prohibited, because by reason of their affinity, they stand to each other in the respective situation of parents and children.

These principles are those of the most eminent writers on the Spanish, French, and Roman laws, as will be sufficiently apparent from the following quotations:—

The relatives of the husband are connected with the wife in the same degree in which they are related to the husband, and *vice versa*. In the ascending and descending line of affinity, marriage is prohibited by the law of nature, between the father-in-law and the daughter-in-law, the son-in-law, and the mother-in-law; between the step-father and the step-daughter, the step-mother and the step-son. For as the husband and wife are but one flesh, the daughter-in-law does in no wise differ from the daughter. And as marriage between father and daughter is null by the law of nature, the same must be said of that between the father-in-law and the daughter-in-law; the reason is, the natural respect due to those ascendants, because they are to each other as parents and children. Affinity in the direct line, is a perpetual obstacle to marriage, as in the case of consanguinity: in the collateral line it does not extend beyond the fourth degree.

Matienzo, in *lib.* 5, *Recopil. p.* 21, *n.* 174, 175. Marriage is forbidden in the first four degrees of affinity. The affinity of which we speak is this; the husband and wife being, by their marriage, but one flesh, all the relatives of the

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husband become connected with the wife, in the same degree in which they are related to the husband, and *vice versa;* but the relatives of the husband are in no degree connected with those of the wife. It must also be observed, that the affinity continues to exist even after the death of him from whom it sprung. 2 *Martin*, 75, *n.* 123, 126, 127. Affinity, which is a connection of persons proceeding from a carnal union, is an obstacle to marriage between the persons connected, as far as the fourth degree; if the marriage is contracted, it annuls it. *Pothier, Contrat de Mariage, n.* 160.

Since that time (the eighth century) marriages between connections have ever been prohibited in the same degrees as those between relatives; and when permitted between the latter, this permission extended to connections within the same degrees. *Vinius's Institutes, lib.* 1, *tit.* 10, *n.* 6.

We must abstain from certain marriages through regard to affinity, as with a wife's daughter, or a son's wife, for they are both in the place of daughters; and this rule must be so understood as to include those who have been our daughters-in-law.

Vinius's note on this text. The rule of the civil law is, that no marriage can take place

between those who are in the number of parents or children, which is also the case in affinity. *Febrero ad.* 1, *n.* 169. Marriage between near relatives and connections is prohibited as incestuous. The rule for affinity is this—marriage is prohibited on account of affinity, within the same degrees in which it is prohibited on account of consanguinity.

It results from these authorities, that the prohibition pronounced on this head by our statute, includes the connections as well as the relatives; for as we have already stated, the Spanish law, on this subject, contains nothing contrary to, or irreconcilable with this statute, and is therefore still in force. Besides, the concordance of all those authorities shews that they spring from a common source; and as our statute derives likewise from this source, it is to it we must look for the explanation of any difficulty or doubt that may arise in its application. *Heineccius on the Inst. n.* 152, 160.

The same principle of affinity applies to the incapacity of judging. On this subject we will confine ourselves to the Spanish laws and the Spanish writers.

Whenever the judge, before whom a cause

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shall be pending, is in any manner related to either of the parties, it shall be lawful for either of the parties interested in the cause, to challenge the said judge. 2 *Martin's Dig.* 194, *n.* 11.

The Spanish law, on this subject, is as follows:—

We order, that he who challenges any judge, by reason of kindred or affinity, be obliged to state, in particular, the degree of such kindred or affinity, and the medium or cause whence it comes; and that if he makes no such statement, the challenge be not admitted. *Nuev. Rec.* 2, 10, 19, *n.* 4.

The petition for challenging the judge must express the legal cause of it, and if he be challenged by reason of consanguinity or affinity, it must be stated whence it comes, and in what degree. *Cur. Phil.* 1, *sec.* 7, *n.* 18.

It will certainly not be pretended, that these laws are repealed by the statute; and we would ask, if any judge could be found so void of delicacy as to disregard them, and sit on the bench in a cause in which his father-in-law or brother-in-law were a party.

We will dismiss the subject with the two following quotations:—

If the judge is the relative or connection of one of the parties, it is a just cause for challenging him. 1 *Murillo*, 1, 2, 286. There are many causes for challenging the judge as suspected of partiality; the first, for having a great intimacy with one of the parties; the second, for being related to or connected with one of them, but not, if he is so with both. *Feb. ad.* 2, 3, 1, *n.* 431.

Coming now to the exclusion or incapacity of standing as a witness, we find on that head, the following disposition in our *Civil Code*, 312, *art.* 248. The competent witness of any covenant or fact, whatever it may be in civil matters, is that who is above the age of fourteen years complete, of a sound mind, free or enfranchised, and not one of those whom the law deems infamous. He must, besides, be not interested, either directly or indirectly in the cause. The husband cannot be a witness either for or against his wife; nor the wife for or against her husband; neither can ascendents with respect to their descendants, nor the descendants with respect to their ascendants.

This latter part agrees with the Spanish law. *Partida*, 3, 16, 14. The father, grandfather.

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and other ascendants in the direct line, cannot be witnesses for their sons, grand-sons, and other descendants in the same line; neither can any of these descendants be witnesses for those from whom they descend.

We say, that these laws agree in the exclusion of the ascendants and descendants, as witnesses in favour of each other. As to their exclusion as witnesses against each other, we have, in the same *Partida*, and title the law 11th, which runs as follows:—

All the ascendants and descendants in the direct line, and in the collateral line, relatives, within the fourth degree, cannot be compelled to be witnesses against each other, in suits touching their person, their fame, or the greater part of their fortune. Neither can the son-in-law be compelled to give evidence against his father-in-law, nor the latter against his son-in-law; neither the step-son against his step-father, nor the latter against the former. The reason is, because they must consider each other as father and son. But their voluntary testimony against one another, may be received, and must be looked upon as valid.

And on the subject at large we have the following law:—

Regularly, all persons may be witnesses, except those who are prohibited, among whom are the following:—the relative within the fourth degree; the one who has an interest in the cause; the intimate friend; and capital enemy. *Cur. Phil.* 1, *sec.* 17, *n.* 13.

The note on this article refers to *Barbosa, vot. decisiv. vot.* 9, *n.* 6, where we find the following illustration:—

Those who are related to, or connected with one of the parties in the fourth degree, prove nothing, and deserve no credit. If the witnesses produced by one of the parties, should reap any advantage from their own testimony, because the property in question might thereby become theirs, or their descendants might have it by succession; in that case, it is certain, that they are not proper witnesses. The reason is this; if witnesses do not prove in a case wherein some of their affections are concerned, or some praise or blame might accrue to them, though the suit be not principally against them; much less must those prove who depose in a case whence they might reap a benefit, though only consequential; because they are supposed to be blinded by it.

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If this authority could leave some doubt in the explanation of the law on this matter, it would be removed by the uniform doctrine of *Murillo* and *Febrero*, which agrees with that of *Barbosa*, as will be seen from the following extracts:—

There are certain persons who cannot be witnesses for each other, thus male and female ascendants in the paternal and maternal line, cannot be witnesses for their descendants in either line, nor the step-father for his step-son, neither can descendants testify in favor of their ascendants; for all these are held as suspicious on account of their natural affection for one another. For the same suspicion of affection, the husband and wife are not admitted as witnesses for each other. Relatives and connections within the fourth degree exclusive, are rejected as witnesses for their relatives and connections in criminal causes, and in civil suits of importance, because affection for one's relations and friends is commonly an obstacle to truth. *Art.* 154, *n.* 6, 289. Parents cannot be witnesses against their children, even if they consent to it; nor can the latter be witnesses against the former; neither can relatives within the fourth degree,

depose against each other, nor the father-in-law against the son-in-law, the wife against her husband, the step-father against the step-son, and *vice versa*. Yet in Spain, though ascendants are not compelled to give evidence against their descendants, they are admitted to depose against them of their own free will. 1 *Murillo*, 287, *art.* 153.

There are various persons who are not compellable to be witnesses against one another:—such are ascendants with respect to their descendants, and *vice versa*, whether in a criminal or civil cause; this is founded on the love of parents for their children, and on the respect due by these to their parents. Under this head are classed the father-in-law and mother-in-law, the son-in-law and daughter-in-law, the step-father and step-son, who, though willing, are not admitted as witnesses by our common law. Neither are relatives and connections, within the fourth degree, obliged to be witnesses, because it were hard to compel them to testify against their own blood. All these however, if they consent of their own accord to be witnesses against the above named persons, are admitted by the Spanish law. *Id.* 301, *art.* 78.

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Ascendants and descendants are not admitted as witnesses. Ascendants and descendants, as well as collaterals, within the fourth degree, cannot be forced to appear as witnesses against each other, in causes touching their persons, fame, or the greater part of their fortune; neither are the father-in-law, son-in-law, step-father, and step-son, compelled to give evidence against each other, tho' this evidence is admitted if freely given. *Febrero, ad.* 2, 3, 1, *n.* 297 & 300.

These principles are those of the French jurisconsults, as may be collected from the following quotation of *Evans' Pothier, vol.* 1, 518, *n.* 792: we reject the depositions of witnesses, who are related to, or connected with both or either of the parties, as far as the fourth degree of collaterals inclusive. Observe, that relatives and connections of a party, cannot depose in his favour, or even against him. Kindred and alliance induce a suspicion of either amity or hatred, either of which is repugnant to impartiality.

Turning to the Roman law, its doctrine will be found to corroborate the positions we have taken. *La Clef des lois Romaines, tom.* 2, 632, *verbo Temoin.*

The law *Julia*, on public judgments, forbids compelling any one to give evidence against his father-in-law, his son-in-law, his step-father, or step-mother, his cousin, or second cousin, and those who are related to him in a nearer degree. *Dig. lib.* 22, *tit.* 5, *l.* 4.

There are some persons whose testimony is not received but in certain cases; among these are parents against their children, and reciprocally. *Dig. lib.* 22, *tit.* 5, *l.* 9. *Code, lib.* 4, *tit.* 20, *l.* 5.

Those who are not bound to give evidence against one of the parties, are relatives within the seventh degree, and connections who stand in the respective situation of ascendants and descendants. *Dig. lib.* 22, *tit.* 5, *ll.* 4 & 5, *lib.* 38, *tit.* 10, *l.* 10.

It is undeniable, that the Spanish legislator, and the compiler of our *Code*, in using the terms of ascendants and descendants, meant thereby the connections as well as the relatives. The former by his 11th law, had prevented the possibility of a doubt on the subject; the latter derived his disposition from the former, and both from the common source, the Roman law; the true meaning of which is sufficiently expounded by the unanimous

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opinions of all civilians. Neither can the assertion hold, that the Spanish law, on this subject, is repealed by our statute; for so much of those exclusions as it intended to repeal, has been expressly stated in our *Civ. Code*, 312, *art.* 249, where it is said, the circumstance of the witness being a relation in the collateral line, as far as the fourth degree inclusively, of one of the parties interested in the cause, or engaged in the actual service or salary of one of the said parties, or a free coloured person, is not a sufficient cause to consider the witness as incompetent, but may, according to circumstances, diminish the extent of his credibility. What then would be the use of this article in the *Code*, if it is not to repeal that part of the exclusions pronounced by the Spanish law?

From all this we conclude, and expect to have satisfactorily shewn, that the expressions used in our *Civ. Code*, *loco citato*, of ascendants and descendants, include the *affins* or connections, as well as the *consanguinei*, or relatives.

It is contended, that they are not included, because, if this doctrine should prevail, the connections must be admitted to the right of succeeding to the estates of each other, on the same footing as the relatives.

The doctrine we maintain, remains unimpaired by this observation, for the consequence thereby drawn from the above principle, is precluded by a positive law, as we are taught by *Febrero*, in his edition *Addicionado*, *part.* 1, *cap.* 1, *n.* 169: where he says—affinity gives no right to succeed to the estates of connections; referring by the note to the *Justinion Code*, 6, 59, *v.* 7, where we meet with the following provision; affinity gives no right to successions.

Before concluding this argument, we must moreover observe, that the witness, independantly of the actual interest of his daughter, and his own eventual one, as already stated, has himself a direct and actual interest in the cause, as vendor of the very negroes against whom this action is chiefly brought, as liable to our tacit mortgage. We ground this position on the Spanish law, *Partida*, 3, 16, 19. If a person has purchased a thing from another, and a suit is afterwards instituted against him for that very thing, he cannot produce as his witness, the person from whom he purchased it, because the latter being bound to make it good, is as much concerned in the suit as the purchaser himself.

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The counsel for the defendant maintains, that even on this head, the witness is uninterested in the event of the suit; for, says he, the plaintiffs are his creditors for the amount of their claim, and they will remain his creditors if there be judgment against them; if, on the contrary, judgment be given in their favor, then the defendant becomes of course his creditor for the same amount, and consequently the witness will only have exchanged one creditor for another, without altering the debt.

This may be true to a certain degree, but the witness is not the less directly interested in the event of the suit; for if there be judgment in favor of the defendant, both credit and debt stand unaltered, the plaintiffs having then no right to charge the witness with the costs of this suit; while on the contrary, if judgment be rendered for the plaintiffs, they recover those costs from the defendant, who thereby becomes the creditor of the witness, not only for the amount of their claim, but moreover, for the amount of those very costs, which therefore at least constitute the direct interest of the witness, in the issue of the cause.

Livingston, for the defendant. Exclusions contained in our *Code*, 312, *art.* 248, which is our only rule on this subject, relate only to persons standing in the enumerated relations to the parties to the suit, not to those who may have those relations to others remotely interested in the event. For instance, a witness sworn on his *voir dire*, declares that he is the plaintiff's security for costs, or that the plaintiff has promised him a certain sum if he recover; either of these facts will exclude his testimony; but was it ever supposed that the father or son of a person standing in the predicament of such witness, would also be excluded? I should think not. The witness would in such case be indirectly interested; that is to say, if the plaintiff was unable to pay the costs, he would be obliged to pay them, which is an indirect interest for loss: and if the plaintiff gained his cause, and if he complied with his promise, he would recover the stipulated sum, which would be an indirect interest for gain; but the *Code* does not exclude the ascendants and descendants of those who have an indirect interest, but the ascendants or descendants of those who are parties; and by a liberal construction, those who have a direct interest; that is, those who

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must (not those who may) gain or lose by the decision of the cause. The words are, " the husband cannot be a witness for or against his wife, nor the wife for or against her husband. Neither can ascendants with respect to (that is to say, in reference to the prior member of the sentence, for or against) their descendants, &c.

Now, here the wife, if she have any interest, has only an indirect and eventual one.

It is doubtful whether she is in community with her husband. It is true, the *Code* declares that every marriage contracted within this territory, carries with it a community: but how does it appear that those parties were married here. They may be, and probably are, from some other part of the world. Whatever is necessary to support our objection, must be shewn by the party making it. If this fact is necessary, then the plaintiff should have put the evidence of it on the record.

But even if the community did exist, it creates no direct interest in the wife; by the 66 *art. p.* 336, of the *Code*, the husband is head and master of the community; he may sell and even give it away without the consent of

the wife, &c. Now, it appears to me rather paradoxical, to say that I have a direct interest in any thing which another may sell or throw into the fire, without my consent. I may have a direct interest in a thing of which another has the administration; but not in that which he may destroy or give away; these are acts of absolute, undoubted ownership, which preclude the idea of direct interest in any other.

The truth is, that the wife has no interest whatever in the effects which compose the community, while the community lasts; but she has a right to one half of the gains, which, at the dissolution of the community, appear to have been made while it lasted; then her interest becomes vested and direct; until then, it is wholly eventual and uncertain; depending on the will or caprice, or mismanagement of the husband. The words of the law render this clear. She is entitled to the community of acquets or gains, *art.* 63. But this can only be known at the dissolution of the community. In common partnership, the stock and the profits belong as much to one partner as to the other, even if there be no gains; but in the matrimonial partnership, the

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wife is only entitled to one half of the gains; and therefore, whatever acquisitions have been made, if there is not a balance of gains, she has nothing.

In this case, although Vignaud should be decreed to be the owner of the slaves, it may not increase the community; because he may owe more than their value; and even if he do not, it depends on the event of his future administration, or on his will alone, should he incline to give them away, whether they will increase the amount of the common property at the time of his death. The wife then has only a contingent interest; and that of her father, depending on the existence of profits for his chance to acquire, on her dying before him, and on her dying without children, is still more remote; he is not an interested witness.

Whether he is excluded under the terms of our *Code*, is the main enquiry.

I have laid it down, that all persons not coming under the exclusions in the 248th *art.* of the *Code*, are competent. For the article begins with declaring, who shall be a competent witness—if above fourteen, free, of sound mind, unimpaired by connection of an in-

famous crime, and uninterested, the witness is competent. The only further exclusions are those of persons standing in the relation of husband or wife; or ascendant and descendant. Can it be doubted, that these are the only qualifications and exceptions? If they are not, then intimate friends, inveterate enemies, and the other persons incapacitated by the civil law, would all be excluded. But even if this article of the *Code* should not be deemed to repeal the former laws on this subject, there is a statute which certainly does: The act of 1805, establishing the practice of the superior court, expressly declares, that direct interest or infamy only shall render a witness incompetent. This law is unrepealed, except so far as the *Code* has encreased the number of exceptions. The only question then is, whether the wife's father is the ascendant of the husband; I have shewn the uniform, the invariable sense in which this term is used in the same *Code*, in which this provision is contained. And I ask them, whether they ought to give it a different interpretation from that which the legislature, unbroken by one single exception, have given.

I cannot but think the reasoning of the

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plaintiffs, on this point, somewhat curious. We are enquiring whether the wife's father is the ascendant of the husband; this is our only enquiry.

And to answer it, we are gravely told, that a man cannot marry his wife's grandmother; and that a judge cannot sit in judgment on the wife of his son. For the learned pages of the plaintiffs brief really tell us nothing more. Now, all this I am perfectly ready to acknowlege; and moreover, to agree, that this is in perfect concordance with the Roman, Spanish, and French laws.

But, does it follow from this, that the ascendant of the wife is also the ascendant of the husband; which is our only enquiry? If the authorities, indeed, had shewn, that the words in a statute had been construed by any commentator, in the way he contends: for, I confess this would have some remote application. Because, even then, our courts must adopt the sense in which our own lawgivers have used the word, rather than that in which commentators have given to it.

The example taken from *Part.* 4, *tit.* 6, *law* 4, is a striking proof, that when this construction is to be given by law, the law takes care

to express it. Here, marriage in the ascending and descending line, is forbidden: according to the plaintiffs' reasoning, this would have been sufficient to exclude relations by marriage or affinity; but the Spanish lawgiver did not think so, for the subsequent law (5th) expressly extends it to the connections by marriage. This law being unrepealed, I agree with the defendant's counsel, that it prevents marriages within the degrees of affinity prohibited, but I really cannot see how this applies to witnesses.

The authority from *Rodriguez's Dig. ley.* 38, is explanatory of the degrees of affinity, which I never intended to dispute; and if our law on the subject of witnesses, had spoken of the degrees of affinity, there would have been an end of the dispute.

Murillo is to the same effect, still speaking of the prohibited degrees of affinity or consanguinity in relation to marriage. Which rules were founded on very different reasons from those which render witnesses incompetent. The same observations apply to *Matanzo*, *Febrero*, *Pothier*, and *Heineccius*.

The authorities on the subject of challenges to a judge, seem doubly unfortunate. For

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they are not only inapplicable to the case of witnesses, but shew most explicitly, that whenever the incapacity is intended to be created by affinity as well as consanguinity, they take great care, as in the case of marriages, to express it.

Martin's Dig. p. 194, *n.* 11, the expressions are in "any manner related," which clearly includes a relation by affinity.

The *Recopilation* expressly uses the term "affinity," as well as kindred.

The *Curia Phillippica* uses the same words.

These laws, it is said, are not repealed. It is perfectly indifferent to my argument whether they are or not; if in force, they govern only the cases for which they were made; but whether in force or not, they serve my argument, by shewing, that the Spanish legislators thought affinity and consanguinity two different relations, and when they wished to include the former, they used express words for that purpose.

We come now to the authorities on the subject of witnesses; and here the plaintiff is, if possible, still more unfortunate in his quotations.

The Spaniards, it seems, had a law nearly

in the terms of ours, 3 *Part.* 16, 14, declaring, that ascendants and descendants could not be witnesses at all. But the 11th law, also quoted by plaintiffs, after specifying, particularly, the ascendants and descendants, *eo nomine*, enumerates other relations, and among them, particularly sons-in-law, and fathers-in-law; declaring that they cannot be forced to give testimony for each other; but their voluntary testimony against each other, shall be received. Does not this clearly prove that the Spanish law considered the relations as different, by making different provisions with regard to them. All the commentators follow the text on this subject, as might be supposed; and all particularly enumerate the relations by affinity, as being excluded by this express law, which, as we have seen, provides for their exclusion by name.

The truth then is, that relationship, by affinity, prevents marriage when within the prohibited degrees.

That it is a good cause for challenge to a judge.

And that, under the law, as it stood before our statute, it was a good objection to a witness.

But, that since our repealing statute of

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1805, no other objections are good, but those created by that statute or the *Civil Code*, and that no other relations, but direct ascendants or descendants, being contained within those exceptions, no other relationship will disqualify.

The objection of interest, with which the plaintiffs close, I have before answered.

1. By shewing there is no interest.

2. By saying, that this objection was not made at the trial, and that if it had, and the court had sustained it, it might have been removed by a release.

Seghers, for the plaintiffs. The *Code* provides an action for the wife against the heirs of her husband, for one half of the common estate, which he might have disposed of to her injury. Does not this clearly shew that she has a direct interest in the common property, though the husband has the administration and even the disposition of it? For otherwise, whence would her action originate?

The reasoning by which the defendant's counsel endeavours to establish the contrary doctrine, is grounded on the first part of the *art.* 66, *p.* 336, already quoted, which says,

that the husband is the head and master of the community; that he may dispose of the effects thereto belonging, without the consent of the wife; because she has no sort of right in them, until the community be dissolved; but here he has overlooked the latter part of the same article, as we have already observed. There is an instance in which the wife may likewise dispose of the effects of the community without the consent of her husband. *Civ. Code*, 28, *art.* 25.

"The community may be considered as a moral being. The stock of the community belongs to both the husband and wife. But the community cannot act by itself; some one must administer its effects; some one must represent it; this will devolve on the husband. Through his agency the community will do whatever it would do by itself were it a real being: all its powers are thus transferred to its administrator. Yet he cannot injure his wife; he can do nothing to defraud her of the rights which she has in the community. The husband is in short an administrator, who has the same power as the owner; that is, the community, to which he is accountable for the use he makes of it." *Leclercq* 5, *Droit Romain*, 9.

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"The wife cannot alone and by herself dispose of any thing of her share in the community while it lasts; but she may do it jointly with her husband. When the husband contracts and disposes alone of the effects of the community, as he is supposed to contract in his capacity, as head of the community, he is supposed to contract both for himself and for his wife; and his wife, though neither present at, nor named in the contract, is supposed to contract with him for the share which she has in the community." *Pothier, Traité de la communauté, n.* 498.

"When the wife is a public merchant, and disposes of the effects of the community, she is deemed to dispose jointly with her husband, who is considered as approving such contracts." *Idem. n.* 500.

To the defendant's counsel, it was reserved to inform us, that the wife has no direct interest in her husband's increasing or impairing the common stock; or in other words, in his growing rich or poor. Could it even be for a moment admitted, according to his doctrine, that the wife has only a contingent interest in the common stock, it were no less true that she has an actual and direct interest

in the increase of that stock, even if it were only with respect to the income. For her daily comforts, and her family's, must keep a proportion with the common revenues which constitute the means of her husband. *Civil Code*, 26, *art.* 20.

The wife then, has not a contingent, but a direct interest; and that of her father, on her dying before him without issue, is not so remote as not to create an indirect interest; he is therefore an interested witness.

It is contended that the civil law was repealed by the act of 1805, establishing the practise of the superior court. It seems indeed, that the common law was thereby introduced on this subject, in the stead of the civil law. But in conformity with our general system of jurisprudence, the latter was restored by our *Civil Code*, confining however the further exclusions to the ascendants and descendants. We do not certainly incline to extend the exceptions any further, but we maintain that the civil law having thus far been restored, the words which it uses must be explained according to its rules, which are far from being impaired by the meaning given to the same terms in other parts of the *Code*.

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The defendant's counsel contends, that if the *affins* or connections, are under legal incapacities, it is not because the law considers them in the same light as the *consanguinei*, or relatives, but because they are, *eo nomine*, designated in the law. His reasonings present us with a striking instance of his error on the point.

The statute of 1805, which he is pleased to call the repealing statute, is itself repealed *in toto* by the *Code* since, by the two articles 248, and 249, all its dispositions are literally either preserved, altered or repealed; and as we have stated in our former argument to which we must refer the court, those two articles of our *Code*, clearly shew by themselves what incapacities pronounced by the civil law, were thereby intended to be preserved or abrogated.

Marriage between persons related to each other in the direct ascending or descending line, is prohibited. *Civil Code*, 24, *art.* 9.

The husband cannot be a witness for or against his wife; neither can ascendants with respect to their descendants, or the descendants with respect to their ascendants. *Id.* 312, *art.* 248.

Where is the difference between these two provisions, either in their words or in their meaning, to justify the two opposite inferences which the defendant strives to draw from them, that the first includes relatives by affinity, and that the latter does not? Did there exist any, would it not be in favor of the first, which contains the word direct, not to be found in the latter, though the defendant liberally bestows it on this too? It is true, that our legislators have been somewhat more explicit on the incapacity of judging, than on the others; but does it follow that the uniform rule is thereby repealed as to the latter.

By an attentive perusal of the laws quoted, it will be found that their different provisions proceed, not from any distinction between relatives and connections, but from a difference in the cases to which they apply; it will be found moreover, that the 11th law, in enumerating the connections after the relatives, gives the reason why they are considered in the same light. And it is to be observed, that afterwards, the 14th law, speaks only of ascendants and descendants, as does our *Code*, without making any mention of affinity or consanguinity. Yet all the commentators in

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analyzing this law, do not hesitate to say, do not even make it a question, whether the connections are therein included, as well as the relatives.

"It was necessary in order to perfect the union of marriage, that the husband should take the wife's relations in the same degree, to be the same as his own, without distinction, and so *vice versa*; for if they are to be the same person as was intended by the law of God, they can have no difference in relations; and by consequence, the prohibition touching affinity must be carried as far as the prohibition touching consanguinity." 4 *Bacon's Abridgment*, 527.

"Hence it hath been adjudged that the marriage of two sisters, one after the other, was incestuous, being in the second degree." *Ibid.* 528.

"So it hath been resolved, that marrying the sister's daughter is incestuous, being in the third degree. So it hath been resolved in a variety of books and cases, that the marriage with the wife's sister's daughter was incestuous, being likewise in the third degree, and the degree of affinity being the same with that of consanguinity." *Ibid.* 529.

The reasons on which the rules of prohibition, in relation to marriage, are grounded, are certainly different from those which render witnesses incompetent; but both derive from a common source the intimacy which exists between relations within the prohibited degrees. For, if on one side the familiar intercourse, resulting from this intimacy, would endanger morals; on the other side, this same intimacy must produce such an affection as to blind the witness, and endanger the truth and impartiality of his deposition.

The objection which rested on the costs of this suit, stands unimpaired. It might have been removed, says the defendant, by a release at the trial. The counsel here forgets, that at the trial, the defendant had as yet no claim on the witness for those costs, as they were neither decreed by the court, nor paid by him; and that consequently he could give no release. "A release is the giving or discharging of a right of action which a man hath, or may claim against another, or that which is his." "It is a general rule in our books, that a mere possibility cannot be released, and the reason thereof is, that a release supposeth a right in being." *Jacob's Law Dictionary, verbo Release*, 1 & 5.

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Some doubts have arisen on the correctness of an assertion contained in the Latin index of the *Partidas, verbo Affinitas, in fine: Affinitatis tres sunt gradus, ascendentes, descendentes et collaterales, n.* 1, *per text. Ibid. leg.* 2, *tit.* 13, *Partida*, 6.

On referring to the indication, we find that this law 2, treats of the degrees of consanguinity only. But it must be recollected, that the Latin index relates to the notes, not to the text. The note on this law refers to *Partida*, 4, *tit.* 6, *l.* 2. *Que cosa es linea, por do desciende ó sube el parentesco: é quantas lineas son.* This law cannot be detached from the law 3, which is but a continuation of it, as appears from the title: *que cosa es el grado, porque se cuenta el parentesco: e quantas maneras son del.* The commentator in his Latin text, explains the law as follows: *Secundùm jus civile alitér considerantur gradus, et aliter secundum jus canonicum. Sed in ascendentibus et descendentibus utrumque jus concordat. Et secundùm primam computationem, gradus dicitur connumeratio singularum personarum, cognatione vel affinitate sibi conjunctarum. Secundum aliam, dicitur gradus enumeratio personarum, cognatione vel affinitate conjunctarum.*

The law 4, gives the manner of counting the degrees of consanguinity; and the law 5, says, *Por tal allegança como esta todos los parientes de la muger se fazen cuñados del varon, e otrosi los parientes del se fazen cuñados de la muger; cada uno dellos en aquel grado en que son parientes.* And the commentator in the Latin text, says, *Copula carnalis per matrimonium facit virum affinem consanguineis fœminæ, in eo gradu in quo tangunt eam per consanguinitatem, et idem, et è contrà.*

It must be remarked, that the Latin index of the *Partidas*, may in some manner be itself considered as an authority. It was composed by the nephew of the commentator. The edition from which the quotation of the index, and the foregoing abstracts are taken, is of 1767; the text, gloss and citations of which, were reviewed and corrected, with the greatest care, by the order of the royal council of Spain. Therefore, I am convinced that the passage quoted, far from being an error, either of the author of the index, or of the editor, is an assertion warranted by the several parts of the text and gloss which I have cited.

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I am still more strengthened in this opinion, by the uniform doctrine of the elementary writers on the subject.

Elizondo, Practica Universal, tom. 1, 358, *n.* 10. *Entre los affins en la linea recta de ascendientes y descendientes, es prohibido el matrimonio por derecho natural; y en la colateral, por derecho positivo ecclesiastico tan solamente.*

Murillo, lib. 4, *n.* 128, *p.* 78. *Nunc arborem consanguinitatis et affinitatis ob oculos apponere decrevi, ut sic facilius lineæ et gradus percipiantur.* Then *p.* 79, he gives the *arbor consanguinitatis*, in which the first four degrees in the ascending, descending and collateral lines are respectively established; *p.* 80, we find the explanation thereof, *Nomina consanguineorum sunt sequentia: in lineâ rectâ ascendente sunt in primo gradu, & 5.* He then goes on citing them *eo nomine*, as well as the descendants and collaterals; *p.* 81, we meet with the *arbor affinitatis*, in which the first four degrees of affinity in each of the ascending, descending and collateral lines, are likewise laid down. Then *p.* 82, *n.* 129, we find this explanation, *Affines in primo gradu sunt sequentes: in lineâ rectâ ascendente, socer: uxoris vel mariti pater: suegro—socrus: uxoris vel mariti mater:*

suegra—vitricus: vir matris: padrastro—nover-ea: uxor patris: madrastra. In lineâ rectâ descendente, gener: maritus filiæ, yerno—nurus: uxor filii: nuera—privignus: filius ex alio conjuge: hijastro—privigna: filia ex alio conjuge: hijastra. In lineâ obliquâ sunt, &c.

Heineccii Recitationes, tom. 1, *lib.* 1, *tit.* 10, *n.* 156. *De adfinitate observandum, ejus propriè nullos esse gradus, quia adfinitates non nascuntur ex generatione, sed ex nuptiis. Sed analogicè tamen et in affinitate æquè gradus statuuntur, et eodem modo numerantur, ac in consanguinitate. Sic et schemata eodem modo pinguntur ac in consanguinitate.*

Livingston, for the defendant. My doubt whether the wife, in this instance, has any interest whatever in the community, inasmuch as it is not shewn where the marriage was contracted, it is supposed ought to vanish before the authority quoted from 4 *Martin*, 649; that property acquired here after marriage in a foreign country, is governed by our laws; this may be true, when there is no contract, containing covenants to the contrary; here nothing appears on that subject, and I have shewn that the burthen of making out the

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whole case, for the exclusion of a witness, is shewn on the party objecting.

Next it is said that I could not have argued that the wife's interest in the community is eventual, if I had read the latter part of the article of the *Code*, 336 (66) which I have quoted; that part declares that the wife may sue the husband's heirs for one half of the acquired estate, which the husband may have fraudulently disposed of, to her injury; I certainly was careless in not drawing the attention of the court to this clause, because it strongly supports my argument, which went to shew that the interest of the wife which was eventual during the life of the husband, vested only on his death; and that then, and not before, an action was given to the wife, to recover what he had fraudulently disposed of; or in other words, had not disposed of at all; for a fraudulent act is null.

If the wife had a vested or direct interest during the life of the husband, surely some means would be pointed out of preserving it during the community, but there is none but by putting an end to it.

The other argument drawn from the *Code*, [illegible] *art.* 25, is surely no objection to my argu-

ment; for the carrying on the separate trade, which is the subject of that article, depends wholly on the will of the husband, and gives her no other control over that part of the community, than he allows.

The quotations from *Leclercq* and *Pothier*, contain nothing that I contest. The husband certainly administers the community for the eventual benefit of the wife; but none of them say the interest is a direct and present one; if the husband is unfortunate or imprudent, the wife will have no gains; and whatever depends on a contingency, is not present and direct. I do not repeat my former arguments on this point, but pray the court to refer to them; and confidently hope they have shewn that Fouque is not an interested witness.

That he is expressly excluded, the counsel, in addition to his former argument, thinks is clear, because he thinks the *Civil Law*, on the subject of witnesses was restored by the adoption of our *Civil Code*. The court will hesitate long, I believe, before they adopt this strange construction; which I would willingly combat, if I could discover any argument by which it is supported.

When I assert that none of the Spanish

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commentators shew that the word ascendant or descendant in a statute, has been construed to mean a relation by affinity; I have repeatedly re-perused the authority to which I have been referred, and must seriously declare that I can find nothing in it contradicting my position; perhaps the court may be more fortunate on referring to it; all it says on the subject, is enumerating persons disqualified as witnesses, *el pariente hasta el quarto grado.* Now as I have shewn that there were express statutes, excluding the *affins*, as well as the *consanguinei*, and this is a practical book, which gives the summary of the rules on the subject from whatever source derived; I confess I cannot see how he contradicts my assertion; as to *Barbosa*, not having the book I cannot refer to it; but if he gives that interpretation of the word, the passage ought to have been quoted.

But whether the exclusion of *affins* in the Spanish law arose from statute, or was derived from the general principles of the civil law; whether we have it in the statute book, or in the elementary writers; it was still a positive law, bearing upon that direct point, and expressly declaring that *affins* cannot be wit-

nesses; but this law is no longer ours, it is repealed, and express terms are introduced which our court must construe in the sense in which they are used in the same *Code*; and moreover, they must be uniform in that construction; and if they say that ascendants means *affins* in the exclusion of witnesses, they must give it the same construction where it is elsewhere used in the same *Code* of laws. The consequences of this, as respects successions, I have pointed out. There are others no less absurd.

The plaintiffs' counsel has corrected me in two inaccuracies, in referring to the *Partidas*, one of which can hardly be called one, for when I said the relations enumerated could not be witnesses at all, it certainly might be understood that they were excluded only in testifying for those relations, which is the text of the law. The other error pointed out, is one of the pen; but neither at all affects my argument. The 11*th law*, 3*d Partidas*, *tit.* 16, appears decisive. It first provides for the case of ascendants and descendants, and collaterals to the fourth degree; *todos aquellos que suben o descendien, por la linea derecha de parentesco e los otros, de la linea de traviesso hasta el*

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quarto grado. Now, if this included the *affins*, there would have been no need of any addition, but the law goes on to provide for them *eo nomine.* *El yerno contra su suegro ni el suegro contra el ni el annado contra sa padrasto.*

As I admit that the degrees of affinity mentioned in *Bacon*, and the other English authorities, are impediments to marriage in England, I have no observation to make on those authorities, but that I am totally at a loss to discern how they apply. If the English law had said generally, ascendants and descendants shall not intermarry, and these words had been construed to mean *affins*, then they might have had some application; at present I can see none.

The interest which it is supposed Fouque had in the event of the suit, by reason of the costs, is clearly an after thought; but is not like other second thoughts, the best; for it is not certain how the judgment of the court may operate as to costs, they are discretional; and even if given against Vignaud, should the plaintiffs prevail, it is by no means certain that the court would make Fouque pay them, if Vignaud had increased them, in an unnecessary, and unjust defence; as it must be deem-

ed if the plaintiffs prevailed. At any rate, if the objection had been made at the trial, it might have been removed by a release. No! says the plaintiffs' counsel, and he quotes *Jacob* to prove it, your liability to costs is a mere possibility; and therefore, it cannot be released. Is it so? Then, there is no interest; for it never was before imagined that a mere possibility was interest, either direct or indirect. Is it not so? Then the release would operate. Take your choice; but do not say it is an interest, and therefore disqualifies. It is a mere possibility, and therefore cannot be released.

Seghers, for the plaintiffs. Under the *art.* 63, *p.* 337, of our *Code*, there is a legal presumption of the existence of the community. If the defendant's case makes an exception to the general rule, it was for him to prove it. As it is no longer contested that the slaves were acquired here after the marriage, it becomes immaterial where it was contracted. Were it otherwise, it would be no difficulty to trace in the record, the proof that the defendant married here the daughter of the witness, and that from the very day of

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his marriage, up to the failure of the latter, they resided together in the same house, and made but one family. This fact may be collected from the deposition of the defendant's own witnesses, in the suit of Fouque's syndics against him, the record of which he introduced as evidence in this case.

The true defendant, in the present cause, is the community itself. It must be remembered that this is an action *in rem*, brought chiefly against the slaves, and accidentally against the defendant, as their third possessor. It is in evidence that he acquired them during his marriage, and therefore they belong to the community. The defendant coming into court to defend the suit, represents the community, which does, by his agency, what it would do by itself, were it a real being. In his capacity as head of the community, he is supposed to appear both for himself and for his wife; and the latter, though neither present in court, nor named in the defence, is supposed to appear with him for the share which she has in the community. The wife being then, in fact, a party to the cause, through the agency of her husband, her father is no less inadmissible as a witness than the father of the husband.

The principle, that the wife's disposing of the effects of the community, depends on the will of the husband, is reciprocal, as expounded by *Pothier*, in the passages quoted in my former argument. For *Pothier* says, in his *n.* 500, that when the wife thus disposes, she is deemed to do it jointly with her husband, who is considered as approving the contract.

And in his *n.* 498, he says, that when the husband disposes alone of the effects of the community, he is supposed to contract both for himself and for his wife, who is supposed to contract with him for the share which she has in the community.

Leaving aside, for a while, the wife's interest in the common stock, she is no less directly and actually interested in the increase or decrease of the common revenues, as I have shewn in my former argument, referring to our *Code*, *p.* 26, *art.* 20.

I persist in thinking, that the latter part of the *art.* 248, *p.* 312, of our *Code*, pronouncing the incapacities of ascendants and descendants, was thus far a restoration of the civil law. To this was my assertion confined; for I have shewn, that by *art.* 249, the further incapacities pronounced on that subject by the

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civil law, were repealed. According to the defendant, the statute of 1805 had completely abrogated the civil law on witnesses. This necessarily left an inconsistency in our general system of jurisprudence, which it was the duty of the compilers of the *Code* to remove. That they did so, as far as was compatible with our present government, may easily be collected from the *Code* itself.

Before the statute of 1805 was enacted, the title 16, of the 3d *Partida*, *de los testigos*, was our rule; by that statute, which is nothing but the common law, no other exclusion is admitted than that of husband and wife. Therefore, the law 15, of the title quoted, which pronounces that exclusion, was alone preserved; all the others were repealed. Now, our *Code*, by adding to this exclusion, that of ascendants and descendants, without distinction, did but restore the law 14, as it stood before. From what other source could the compilers have taken this disposition, than that whence is derived the whole system of our laws? That, in fact, they did thereby restore the law 14 to its full extent; that such was their meaning, clearly appears from the care they have taken to remove, by the *art.*

249, all doubts as to the limits within which, in restoring thus far the civil law, they intended to confine its operation.

According to the defendant, by the statute of 1805, we had parted altogether with the civil law on the subject of witnesses. If the *Code* had intended to persevere in that system; if it had not restored to its full extent, the part of the civil law comprised under the law 14; in a word, if it had been the meaning of the compilers solely to add to the former exclusion, the naked expression of ascendants and descendants, to be construed in the strictest manner, without any reference to our former laws on the subject; then, what was the use of the article 249? Certainly there could be no occasion for it. By that article it is provided, that the circumstance of being a relation in the collateral line, as far as the fourth degree inclusively, or engaged in the actual service or salary of one of the parties, does not affect the competency of the witness. Now, under the statute of 1805, none of those persons were excluded; and therefore, that provision in the *Code* was useless, unless it meant to restrain the operation of the civil law, or of so much thereof as was restored

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by the *art.* 248. It is the civil law which in its dispositions under the *title* 16, already quoted, comprises the very exclusions which are expressly removed by our *art.* 249.

If then the law 14 has been restored by our *Code*, the meaning of the compilers was to restore it to its full extent. That this law, under the denomination of ascendants and descendants, comprises the *affins* as well as *consanguinei*, I think I have satisfactorily shewn in my former arguments; it seems even to have been admitted by the defendant, though on a principle quite different from my own. If any restriction on that law had been intended; if the *affins* were not to be included in its dispositions, this restriction on the civil law would have been added to those provided for by the *art.* 249.

If I have succeeded in proving that the law 14, *tit.* 16, *Partida* 3, is restored, the conclusions which I have drawn from comparing of the two passages of our *Code*, relative to marriages and to witnesses, remains unimpaired: for the incapacities pronounced by the civil law, on either of those heads, proceed from the same principle, that connections or *affins* are considered in the same light as relatives or *consanguinei*.

The defendant maintains, that this is not the reason why the *affins* were included in those incapacities, as well as the *consanguinei;* that they were never comprised but when mentioned *eo nomine*, and that the Spanish legislators thought affinity and consanguinity two relations so different, that when they wished to include the former, they used express words to that purpose. And he concludes with saying, that whether the exclusion of *affins* in the Spanish law, arose from statute, or was derived from the general principles of the civil law; whether we have it in the statute book, or in the elementary writers, it was still *positive law*, bearing upon that direct point, and expressly declaring that *affins* cannot be witnesses.

In corroboration of those strange assertions, he quotes the law 11 of the *title* 16, *Partida* 3, as decisive. It is, indeed, decisive, but in a way quite different from what he asserts.

This *title* 16, as already observed, treats of witnesses at large. The law 10, designates those who cannot be witnesses against others in criminal suits; and the law 11, those who cannot be compelled to be witnesses against each other in criminal suits. *Quales son aquel-*

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los que no pueden ser apremiados, que vengan a testiguar unos contra otros en pleyto criminal. That this was not an exclusion but a privilege, appears from the law itself, and the note 1st of *Gregorio Lopez*. The reason given in the outset of the law for this privilege, is worthy of remark; it proceeds from the respect had to the duties which certain persons owe to each other. *Debdos muy grandes han algunos omes entre si, de manera que non tuvieron por bien los sabios antiguos, que fuessen apremiados para testiguar unos contra otros, sobre pleyto que tanxesse a la persona de alguno dellos, ó a su fama, o a daño de la mayor partida de sus bienes.* Then the law enumerates the persons to whom this privilege belongs, as quoted by the defendant. *E son estos, todos aquellos que suben ó descienden por la liña derecha del parentesco, e los otros de la liña de traviesso fasta el quarto grado.* Now, says the defendant, if this included the *affins*, there would have been no need of any addition, but the law goes on to provide for them *eo nomine*. Where the defendant has discovered, that *parentesco* (consanguinity) means also affinity, (*cuñadez*) and that I ever used it in that sense, I cannot tell. It is obvious, that the law, after mentioning consanguinity,

eo nomine, and extending the privilege to the *affins*, must have done it also *eo nomine*. *E esso mismo dezimos, que non debe ser apremiado en tales pleytos el yerno, que venga dar testimonio contra su suegro, ni el suegro contra el, nin el annado contra su padrasto, nin el padrasto contra el annado.* This is also quoted by the defendant, but here he stops short; for what motives he best knows. Had he, however, gone a little further, he would have met with the reason of the law, with the very principle on which it grounds the extension of the privilege to the *affins*, as well as to the *consanguinei*. *E esto es, porque los unos deben aver los otros como fijos, e los otros a ellos como padres.*

The laws 12 and 13, speak of the testimony of slaves, and the law 14 begins to treat of those who can or cannot be admitted as witnesses in civil cases. This law shews, in a striking manner, how groundless is the assertion, that the exclusion of *affins* in the Spanish law, arose from a positive provision bearing upon that direct point, and expressly declaring that *affins* cannot be witnesses. This is the only law of the whole title, on which the exclusion of *affins* as witnesses, in civil cases, is grounded; for the law 11, does but

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grant a privilege which may be renounced by the witness: that law too, bears only upon criminal suits. And here it will not be amiss to remark, that the Spanish legislator, after having once laid down in the 11th law, the principle upon which the *affins* are to be considered in the same light as the *consanguinei*, mentions them no more *eo nomine*, but includes them all under the general denomination of ascendants and descendants, as may be collected from the law itself, and from all its commentators. The law 14, runs as follows: *Padre, nin abuelo, nin los otros que suben por la liña derecha, non pueden testiguar por sus fijos, nin por sus nietos, ni por los otros que descienden dellos por essa misma liña. Esso mismo dezimos que ninguno destos descendientes que non pueden testiguar, por aquellos de quien descienden.*

On this law, we have the following commentary from *Murillo, lib.* 2, *n.* 153. *Aliæ prætereà sunt personæ, quæ pro certis personis testificari non possunt. Sic* 1. *Ascendentes masculi vel fœminæ in lineâ paternâ vel maternâ, pro descendentibus in utrâque lineâ, etiamsi filius sit emancipatus, vel naturalis tantùm, vel spurius, vel incestuosus, vel adoptivus, testificari nequeunt; neque vitricus pro privigno: nec è contrà descendentes pro ascendentibus:*

nam hi omnes ob naturalem affectionem suspecti habentur, lib. 14, *tit.* 16, *Partida* 3. 2. *Ob eandem affectionis suspicionem, a testimonio repelluntur conjuges et sponsi pro seipsis ad invicem; item concubinarius pro concubinâ: consanguinei et affines usque ad quartum gradum exclusivè, pro consanguineis et affinibus in causis criminalibus vel civilibus arduis.*

It remains to shew how the *Curia Phillippica*, with its reference to *Barbosa*, contradicts the defendant's assertion, that it is only by express statutes that the *affins* are excluded, as well as the *consanguinei*. We agree with him, that the *Curia Phillippica* is a practical book, which gives the summary of the rules on the subject, from whatever source derived. The passage quoted from *p.* 86, *n.* 13. *El pariente hasta el quarto grado*, positively indicates the source whence it was taken: *como se declara en unas leyes de Partida*, quoting *ley.* 8, 10, *et seq. usque ad* 22, *tit.* 16, *Partida* 3. Now, as I have already stated, among those laws, the 14th alone relates to ascendants and descendants, in civil suits; and as the *Curia* refers to *Barbosa* on the subject, *vot.* 98, I will now quote his own words, of which I gave a translation in my first argument on the bill of ex-

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ceptions. *Alii sunt inter quartum gradum consanguinei et affines, et ideò non probant nec fidem merentur. Cùm isti testes commodum reportent, ut eorum filii vel descendentes aliquandò in illâ (re) succedant, certum est eos non esse integros testes. Ratio est, quia si deponentes in casu ubi affectionem aliquam habent, aut eis imminent laus vel vituperium, non probant, licèt negotium contra eos principaliter non agatur: multo minus debent probare illi, qui deponunt in casu, ex quo commodum, licèt in consequentiam, reportent; quia illa commodi affectio oculos caligare creditur.*

As it is seen, the first part of this quotation is a commentary on the word *pariente;* the second part is illustrative of these words of the *Curia: El interesado én la causa,* and may be useful in settling the competency of Fouque as an interested witness.

I agree with the defendant, that the words ascendants and descendants must receive an uniform acception throughout the *Code;* that if they comprise affinity as well as consanguinity in the exclusion of witnesses, they must be so understood every where. I know, that the gentleman has pointed out the consequences as respecting successions; he now tells us there are others no less absurd, but he forgets

to designate them, and I am the more sorry for it, as it is in vain I endeavour to find them out. For I know but of three instances where those words are used in the *Code;* evidence, marriage, successions. The consequences drawn from the latter, I have before answered in my first argument on the bill of exceptions. I shall only observe, that this objection is of an old date. The *Roman Digest, lib.* 22, *tit.* 5, *l.* 4, 5, exempts *affins* from testifying against each other, as it does *consanguinei;* and *lib.* 38, *tit.* 10, *l.* 4, *sec.* 7, it prohibits them from intermarrying, and lays down the principle on which both exclusions are founded. *Hos itaque inter se, quòd affinitatis causâ parentum liberorumque loco habentur, matrimonio copulari nefas est.* It seems, that the consequences drawn by the defendant as to successions, must even then have been objected. For in the *Justinian Code, lib.* 6, *tit.* 59, *l.* 7, we find, that under the emperor Diocletian, fifteen centuries ago, a positive provision was made to settle the objection. *Adfinitatis jure nulla successio permittitur. Febrero* in his *Addicionada, part* 1, *cap.* 1, *n.* 169, teaches us, that this law is preserved in Spain, and that, therefore, affinity gives there no right to succession. *Ni da derecho à*

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la sucession de los bienes de los afines. This law, standing unrepealed in this state, must silence the objection.

As to the incompetency of Fouque from direct interest, I have quoted in my first argument on the bill of exceptions, the law 19, *tit.* 16, *Partida* 3, which excludes him positively, as vendor of the slaves. Of his being the vendor, the proof is on record. This law the defendant has passed unnoticed. But he has supposed that my observation on the liability of Fouque to the costs, was clearly an after thought. So was his own shift of the release. I do not know of any provision of the civil law which admits of such a release on the trial. It is a mere disposition of the common law, which cannot be allowed by our courts, except in trials by jury. Besides, how could that liability be released by the defendant, when it was still uncertain whether he would ever be condemned to costs, and when he had not paid them? Be it as it may, it is now too late for him to plead this ground of defence. Had he intended to make use of it, it must have been done at the trial. His bill of exceptions, shews that I objected to the witness as incompetent, on account of interest; though

it does not state on what grounds the court refused to admit him. I have proved, that he is interested as vendor, and that as such, he is, moreover, liable to the defendant for the costs, in case judgment goes against him. But, says the defendant, the costs are discretional; and besides, it is by no means certain that Fouque be bound to pay them, if the defence be unjust and unnecessary.

I own I am at a loss to conceive on what principle of law or equity the court could exercise a discretion as to the costs of an expensive and tedious law-suit, in which minors are engaged, since several years, for the recovery of their patrimony wasted by their tutor. And even if the defendant were cast, and Fouque was exonerated for the costs of the defence as unjust and unnecessary, yet there would still remain then a part of the costs to which Fouque could have no objection, and for which he was always liable to the defendant, as the latter could not avoid them. The defendant was not the debtor of the plaintiffs, and therefore, their case did not come within the 31st *sec.* of the act of February 10, 1813. 2 *Martin's Dig.* 196. Their action was against the slaves, subject to their

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lien, of which he was the third possessor, and must, therefore, be governed by *art.* 43, *p.* 460, of our *Code.* According to it, after judgment against Fouque, they have obtained an order of seizure on the slaves, which was notified to the defendant; and he, though not personally liable to the debt, has opposed the seizure, by virtue of the *art.* 44, of the *Code, loco citato.* Hence arose this action; and therefore, if the costs were contested, those only could be so which accrued since his opposition. The filing of the petition *cum annexis*, the order of seizure, and the notification of it by the sheriff, to the defendant, occasioned costs, for which Fouque will always be liable to the defendant, who had, and could have no other notice of the plaintiffs' claim, of which they were not bound to make him any other demand. But if they are cast, they will have no claim on Fouque, even for that part of the costs, which therefore constitutes at least his liability to the costs of the action, and makes him an incompetent witness. *Phillip's Evidence*, 46.

PORTER, J. A rehearing has been granted in this case, and the first question to be de-

cided is, whether the father-in-law of the defendant was a competent witness on the trial of the cause.

The counsel who argued this case, have taken great pains in bringing forward every authority which bears upon the question; and the court has been furnished with abundant materials on which to form a correct judgment.

After all that has been said, I think, however, it will be found that this question lies in a narrow compass; and that it must be decided on the meaning which shall be attached to certain expressions used in our *Code* and statutes.

It appears very satisfactorily, that in Spain, persons standing in the relation of the present witness, could not testify. Whether this was in virtue of any expressions of their positive laws excluding them, or whether it was the consequence of a system, which, acting on different principles from our own, multiplied objections to the competence, and disregarded those which go to the credit, need not be considered. The first and most important enquiry is, what change has been introduced here on this subject by legislative enactment?

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By an act passed in the year 1805, 2 *Martin's Dig.* 160, it is provided, that no free white witness shall be disqualified from testifying on the ground of being incompetent, unless such witness shall, at the time of producing him, be interested or infamous; and all other objections shall go to the credit, not to the competence.

This act made the father-in-law competent to give evidence in cases similar to that now before us. And it is an important observation, and one which it is necessary to bear in mind, when we come hereafter to consider the effect of certain expressions in our *Code*, that this law did not alone enable witnesses to testify who were before excluded; but that it introduced a complete change on this subject, in our jurisprudence: expunged at once all the minute and particular distinctions which formerly existed, as to persons connected with the parties in the suit, or subject to their influence; and by restricting the objections which go to the competence, and increasing those to the credit, established an entirely new system as to evidence and proof.

From the passage of this law, until the promulgation of our *Code*, the witness rejected

in this cause, could have been heard. The jury, or the court before whom he gave evidence, it is true, were authorised to take into consideration the relationship in which he stood to one of the parties, and it might affect his credit. But he was clearly competent, and remains so, unless it has been since declared by the same authority, that his testimony cannot be received.

The *Code*, 312, *art.* 248, after stating who are competent witnesses, declares that ascendants cannot testify in respect to their descendants, nor descendants in respect to their ascendants. These expressions, it is contended, exclude the father-in-law. The counsel for plaintiffs supports this conclusion, by reference to the laws of Spain; and has introduced a variety of authorities to shew, that by its jurisprudence, expressions such as those, include ascendants by affinity, as well as consanguinity. He has not proved this position satisfactorily to my mind. Admitting that he has made it doubtful, we must then consider, if making it so can repeal a former law, and that too, in a case where, as far as I can ascertain the intention and policy of the law-maker, are directly opposed to the doctrine for which he contends.

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The first difficulty which suggests itself to the mind, on the perusal of the passage cited is, that if we adopt the construction which the plaintiffs contend for, we affix to the word ascendants, a forced meaning, very different from the ordinary sense in which mankind understands them; and in doing so, violate a rule for the construction of statutes which teaches us, "that the words of a law are to be understood in their known and usual signification—their general and popular use." *Civ. Code*, 4, *art.*

Another difficulty presents itself. If we say that by ascendant is meant the father-in-law, how shall we construe the same words when we are about to ascertain who are forced heirs? It being contrary to the known principles of our laws, to consider as such a relation by affinity.

The first objection is met on the part of the plaintiffs, by contending that the words must be taken in their legal sense; and the second, by shewing, that according to the law, as it stood previous to the enactment of the *Civil Code*, it was provided, that ascendants by affinity could not inherit.

The plaintiffs still further insist, that under

the construction contended for, a man might marry his wife's mother, as the law makes no distinction in that article, where it forbids ascendants and descendants from intermarrying. To this the defendant replies, that the law of Spain expressly prohibited them. *Par.* 4, *tit.* 6, *l.* 5.

Thus, it appears, that the plaintiffs and defendant endeavour to escape from the inconsistencies into which this construction would lead them, by referring the court to the former laws of the country, and they have succeeded perhaps, in shewing that the expressions *ascendants*, in our *Code* does, in the one instance, exclude those by affinity, and in the other, include them; or rather they have proved, that when the legislature used these words, they did not, in either of the cases put, conceive they were at all acting on the rights or duties of relations by affinity.

How then stands the question before the court, in relation to witnesses? Why, according to my opinion, ascendants by consanguinity were alone meant. But admitting, and it is the utmost the defendant can require, that it is doubtful, if it did not extend to relations by marriage; this will not be sufficient

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to repeal the former law, which rendered the witness competent. More must be done than raising a doubt; the law must be clearly repealed. *Civ. Code*, 6, *art.* 24.

If we have recourse to the intention of the legislature as a guide, it is very evident to me that they did not contemplate augmenting objections to the competence of witnesses further than was absolutely necessary; and that the article which has given rise to this discussion, was passed in the same spirit, and with the same view as the act of the legislative council already cited.

I have examined, with attention, all the authorities cited by defendant's counsel. They fall far short of establishing that whenever the words ascendants and descendants are used in law, they literally mean those who have become so by marriage.

The objection taken on the ground of interest, is too remote; and on the whole, I think the witness was competent.

I am therefore of opinion, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded for a new trial, with directions to the district judge not to reject, as an incompetent

witness, the father-in-law of the defendant, unless objections should be made to his testifying other than appears on the record now before this court.

MARTIN, J. I think the district judge was correct in rejecting the testimony of the defendant's father-in-law.

It is admitted, that in Spain he could not have been a proper witness; but held, that under the *Civil Code*, the objection goes only to his credibility.

This would be correct if, as the defendant's counsel urges, the word ascendants had but one signification. I think it has two.

Lato sensu, it includes persons related or connected in the ascending line, by consanguinity or affinity; and in a more restricted sense, it includes only those related by consanguinity. *Ascendentes sunt affines vel consanguinei. Gregorio Lopez.*

When a word has more than one signification, no party has a right to chose *ad libitum* that in which it is to be taken in the argument; it must be understood *secundum subjecti materiam.*

Consanguinity is the basis of the laws which regulate the degrees between which marriage

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is forbidden; the rules of succession and tutorship, the recusation of judges, and the admission or rejection of persons who are offered as witnesses.

Affinity is the basis of the same laws, with the exception of those which regulate successions. 1 *Domat*, v.

In the following sentence, "marriage between persons related to each other in the ascending or descending line is prohibited;" the words, ascending line, must be understood *lato sensu*, so as to include the line by affinity, and that by consanguinity: because affinity and consanguinity are both the basis of the laws which regulate the prohibition of marriage between persons related to or connected with each other. *Civ. Code*, 24, *art.* 9.

In the following sentencc of the same statute, "there are three classes of legal heirs; the father and mother, and other lawful *ascendants*, the last word must be taken in the more restricted sense; because, consanguinity alone, and not affinity, is the basis of the laws which regulate successions. *Civ. Code*, 144, *art.* 10.

Were we to take the word in the same sense, in both these sentences, we would

come to the conclusion *ad absurdum*. The moral sense recoils at the idea of a man uniting himself in marriage with his son's widow; and the social order forbids that she should inherit and carry his estate into her family, to the exclusion of his lineal or near collateral relatives.

If it be granted that the same word may have a different signification in different parts of a *Code*, what is that of the word ascendants in the following sentence? "Neither can ascendants be witnesses with respect to their descendants." *Civil Code*, 312, *art.* 248.

I think *lato sensu*, because both consanguinity and affinity are the basis of the laws which regulate the admission or rejection of witnesses.

No case is better calculated to put the question, in a fair point of view, than the one under consideration.

The defendant seeks to establish the legality of a purchase of certain negroes, during his marriage. The result of the purchase, if it it be established, is the joint title of the defendant and his wife. If he introduced, to support this title, his own father, the objection would be, that the witness came to es-

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tablish his son's title—that a parent cannot be viewed as an impartial witness, nay a disinterested one, when he comes to support his child's right. But he offers his father-in-law, who, it is contended, is not under the same bias. Why not? By establishing the defendant's purchase, the father-in-law establishes his own daughter's right; a title common to her and her husband. The interest of both fathers in the property in dispute, is precisely the same. Nothing stands between either of them, and his title to the slaves, but the life of his child, if the latter has no issue. On the death of the defendant, his father would, as a forced heir, claim his inheritance, of which one half of the slaves would make a part. On the death of the defendant's wife, his father-in-law, now offered as a witness, would stand precisely in the same situation. To the exclusion of either of these men, there are, in my humble opinion, the same reasons, and *ubi eadem est ratio eadem est lex.*

It is said there is no evidence of a community of goods between the defendant and his wife. Such a community, though not of the essence, is of the nature of the contract of marriage, in this state, and the exclusion of it ought not to be presumed.

If there be any case in which the principle that cases which are within the mischief intended to be prevented, though not within its letter, are to be included in the remedy, (1 *Black.*) this is one of them.

I conclude, that the placing of the father-in-law on a footing with the father, as to the incapacity of testifying, or of contracting marriage, does no violence to the words of the *Code*, and is perfectly within its sense and meaning.

Farther, the witness is interested in the event of the suit, being liable for costs.

And, that the judgment of the district court ought to be reversed.

MATHEWS, J. A rehearing having been granted in this case, I have considered attentively the briefs of argument, and am able to discover nothing erroneous in the judgment given by this court, except that part of it which relates to the rejection of the father-in-law of one of the parties, who was offered as a witness in the court below.

It is clear that the father of a man's wife cannot be a witness for him, according to the provisions of the Spanish law. But after much reflection on the subject, I am of opini-

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on, that the rules of former laws, on the subject of the competency or incompetency of witnesses, were repealed by our act of the territorial legislature of 1805. It may be assumed, as a just principle in jurisprudence, that all persons are competent to testify in courts of justice, except such as are prohibited by law. The act of the legislative council renders incompetent persons who, for want of age, must be supposed to be deficient in discretion; those who are interested or infamous; a husband for or against his wife, and the wife for or against her husband. These are the only description of persons disqualified from testifying on the ground of incompetency by this law, which certainly repealed the law of Spain on the subject of witnesses.

Our *Civil Code* purports to be a digest of the laws previously in force in the country, but undoubtedly owes its validity and effect to the authority given to it by legislative acts. And in cases when its provisions differ from the rules of the ancient laws, those prescribed by the *Code* must prevail. The doctrine of the Spanish laws, respecting the incompetency of witnesses, has been revived since the introduction of the *Code*, so far as it relates to

ascendants and descendants; but I am of opinion, that these expressions do not *ex vi termini*, embrace relations by affinity. As to the objection raised to the competency of the witness in the present case, on account of interest, arising from the possibilities that his son-in-law may gain property, that his wife may be entitled to one half of the acquets of the community, that they will not be used nor wasted during the partnership, and that her father may succeed to such inheritance; all these circumstances I consider as raising an interest too remote to render the witness incompetent.

Although, from my present view of the subject, I have discovered nothing erroneous in our former judgment, further than that which relates to the bill of exception, yet as the cause must be sent back for a new trial, should it come before this court again, I feel at liberty to change the opinion which I now hold.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the case be remanded for a new trial.

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HANNA'S SYNDICS vs. *LAURING & AL.*

HANNA'S SYND
vs.
LAURING & AL

APPEAL from the court of the parish and city of New-Orleans.

The garnishee cannot contest the right of the plaintiff.

PORTER, J. This action was commenced to compel the defendants to return certain notes and obligations which they had received from the insolvent, Hanna, as a collateral security for a debt due by him.

Interrogatories were propounded to the garnishees, who answered that the notes mentioned in the petition were in their possession. The parish court decreed that the defendants should deliver them up to the syndics, that a copy of the judgment be served on Richardson & Fisk, in whose hands they were deposited, and that on their failure to comply with the decree, that execution issue against them.

From this judgment the garnishees have appealed, and insist that Lauring had a privilege on these notes; that they were given as a collateral security by Hanna when he was solvent: and lastly, that the defendants had by the transfer and indorsement, an absolute right in them.

These may be very proper questions, if the cause was placed before the court in such a

way as that they could be enquired into. But I am of opinion, that on an appeal by the garnishees, we cannot investigate the merits of the case between the principal parties. All that the former have a right to complain of is the judgment of the court, so far as it affects their interest, with its legality or justice, otherwise they have nothing to do.

Taking for granted, therefore, that the judgment of the court below is correct, as between plaintiff and defendant, since neither party have appealed from it; I cannot find any thing in the decree against the appellants, which requires, or could justify the interference of this court.

The judgment of the parish court, as far as it affects the appellants, should be affirmed with costs.

MARTIN, J. A garnishee has no right, as such, to plead for the defendant; he cannot oppose the plaintiff's claim against the latter. All he is to do in court is, to tell the truth, and if his declaration be controverted, to support it, and prevent any improper decision being made, as far as his own interest is concerned. If such an improper decision be made, he may certainly bring it up for our ex-

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amination: but he cannot step out from the parts of the record which concern him, and draw our attention to errors, which affect the interests of the defendant; for these cannot be noticed by us in the absence of the latter.

We should dismiss the appeal.

MATHEWS, J. This appeal, as already stated, was taken and brought up by the garnishees alone. On examination of the case, in refering to the record, and to the points relied on by the counsel of the appellants, it appears that the interest of the garnishees is not brought in question, independent of the rights of the defendants in the attachment; and as they have not appealed, I am of opinion the merits of the cause ought not now to be investigated: and as an affirmance of the judgment of the court *a quo*, so far as relates to the appellants, might create some confusion in an appeal which may yet be taken by the defendants, the best and safest mode of proceeding, is to dismiss the present appeal. I therefore concur with judge Martin, that the appeal be dismissed.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed.

Seghers for plaintiffs, *Maybin* for defendants.

M'MICKEN vs. *STEWART.*

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M'Micken vs. Stewart.

When a commission issues to any magistrate of a county or parish, the official capacity of the person who makes the return must be shewn, although he subscribes himself a magistrate or justice.

If a clause is susceptible of two significations, it should be understood in that which will have some effect, rather than that in which it will have none.

Appeal from the court of the first district.

Porter, J. The first question to be decided in this cause, is the effect of a bill of exceptions to the introduction of certain testimony, taken under the authority of a commission, directed to any justice of the peace of the state of Mississippi. The return does not shew in any other way than by the averment of the person who took the testimony, that he was a magistrate. This in, my opinion, was not sufficient, and the evidence must be rejected.

This question disposed of, it remains to consider the case on its merits. The action is instituted on the following agreement:—

Woodville, May 9, 1319.

"I promise to pay Charles M'Micken, or order, seven hundred and forty-six dollars; whenever I am advised from David Mimms, or his representatives, of South-Carolina, that he has collected, or has the promise for the payment of the same amount, by William Garrett, or Stephen Garrett, of said place, agreeable to a receipt given for that amount to one Mrs. Martha Melton, dated yesterday; and in

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said receipt, have requested said Garrett to pay said David Mimms, it being for money I collected for David Mimms, and by him directed to be paid over to said Mrs. Melton, formerly Mrs. Wade, but now payable to C. M'Micken, allowing a reasonable time.

Signed, CHARLES STEWART."

This obligation is very obscurely worded, and it is not easy to ascertain for what object the condition was inserted. The parties have not explained it, and differ very much in the meaning they attach to it. The plaintiff contends that it was the duty of the obligor to ascertain the event on which the contract became absolute: while on the other side, it is insisted that the money cannot be demanded until the condition is performed, and that as the payee seeks payment, the burthen of proof lies on him.

Cases of this kind, where the parties have expressed themselves in a loose and confused manner, offer as much difficulty as any that are presented for decision. The best and safest principle to adopt in their examination, is to endeavour to find out the meaning of the parties, and disregarding as much as possible technical rules of construction, to carry the

contract into effect, in the spirit and interest with which it was entered into. This indeed is the direction of the law. "We must endeavour to ascertain what was the common meaning of the parties, rather than adhere to the literal sense." *Civil Code*, 270, 56.

The latitude given by the last clause of the article cited, need not however be assumed in this case; for without deviating from the fair and natural interpretation of the terms used in this agreement, enough, I think, appears to authorise us to say, that the intention of both plaintiff and defendant was, that the obligor should obtain the information wanted.

The situation of the parties to the contract, is the first circumstance which goes to support this conclusion. The obligee, for aught that appears on the record, was a stranger to Mimms, in South-Carolina, from whom the information was to be had: the obligor had been doing business, and collecting money for him: he must be presumed therefore to know him, and it cannot be presumed that M'Micken was to communicate with Mimms, or that the defendant would have wished to rely on intelligence coming through that channel. The manner in which the con-

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dition is expressed, strengthens this construction; for it is not that information shall be given to the obligor, nor as soon as it shall be proved to him, or shewn to him, that such an event has taken place, but "as soon as he is advised from Mimms," a person, as has been already stated, for whom he had collected money, and who was transacting other business in which he was concerned.

But if this interpretation still leaves the case doubtful, that doubt I think must cease when we come to consider the last words of the agreement, "that a reasonable time is to be allowed." These expressions were useless, if the person to whom the note was payable, undertook to ascertain the fulfilment of the condition. Because it must be presumed he would lose no time in getting a knowlege of the event and communicating it; and because the maker cannot be supposed to have had any very direct interest in hastening the payment of his obligation. If we adopt the other construction, that the obligor was to enquire and learn when Mimms had collected the money, the expressions, "allowing a reasonable time," are at once explained. It was a proper and necessary precaution on the part of the

obligee, for without it, his payment might have been postponed to such a period of time, as would have greatly diminished the value of the obligation.

There is scarcely any of the rules furnished us for the construction of agreements, more useful in its application, than that which teaches us, that if a clause is susceptible of two significations, it should be understood in that which will have some effect, rather than that in which it will have none. *Civ. Code*, 270, *art.* 57. If we say that the payee of the note was to procure this information, the words of the agreement just alluded to, are useless, and unintelligible; if, on the other hand, we consider the contract in the supposition, that it was the duty of the maker to ascertain the fact, they are important, and such as a prudent man would seek to have inserted. I think therefore we should adopt the latter sense, because in the former they are idle and nugatory.

The obligation is dated May 9, 1819, and suit was commenced 13th November, 1820. This was a sufficient time to enable the defendant to have ascertained whether the event was accomplished, on which his obligation

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became absolute. I am therefore of opinion, that the judgment of the district court be affirmed with cost.

Martin, J. I concur in judge Porter's opinion.

Mathews, J. I have examined this opinion attentively, and concur in it. In relation to the bill of exceptions, I think it would be a dangerous doctrine, to allow depositions to be read in evidence, in a suit when the commission for the examination of witnesses is directed generally to any justice of the peace, residing in another state, unless it should be made to appear by other evidence, than the simple signature of the commissioner, that he is such. This differs from cases when the commissioners are appointed by name.

The obligations imposed by the instrument, on which the action is founded, on the parties, are so well expounded, and clearly deduced, that I deem it superfluous to add any thing to what has been already stated.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Livermore for the plaintiff, *Porter* and *Duncan* for the defendant.

KENNEY & AL vs. DOW.

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KENNEY & AL. vs. Dow.

APPEAL from the court of the parish and city of New-Orleans.

To set aside an alienation, fraud in the alienor, knowlege in the alienee, and injury to a third party, must be shewn.

Pierce, for the defendant. Timothy Dow being a creditor of Nathaniel Olcott, to the amount of $1800, or upwards, made an agreement with Olcott, by which his effects and stock in trade, in a grocery store, were to be sold to Dow, and credit given according to the appraised value.

Accordingly Dow and Olcott, assisted by the clerk of the latter, having estimated the property at $1400, a bill of sale was executed on the 2d of March, 1821, by which, in consideration of that sum of $1400, which Olcott acknowleged to have received, he transferred all his interest in the business, conducted by him in No. 15, Toulouse-street. Dow took possession, Olcott's sign was removed a few days after, and the affair so slept until about the 9th or 10th of the next month of April, when I. W. Kenney, L. Paimboeuf, and G. C. Forsythe, representing themselves as creditors of the said Olcott, petitioned the parish court to the following effect:—

They complain that Nathaniel Olcott has,

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within these few days past, manifested symptoms of a deranged mind, and in consequence of the improper persuasion of T. Dow, one of his creditors, he has assigned, transferred, and sold the whole of his effects and stock in trade, to the said Dow, and that inasmuch as the said sale is without any good consideration in law, and fraudulent against all the creditors of said Olcott, they pray process of sequestration against the said property, and that provisional syndics may be appointed to take charge of the same; that Dow may be cited, and the sale aforesaid be rescinded and annulled.

The plaintiffs then made oath to their alleged claims. The sequestration issued, but was suspended upon motion. T. Dow having then filed an answer, being a general denial, the cause came on for trial. The testimony being heard, the court below decided, that N. Olcott was not insane; that there was no undue influence or persuasion exercised by Dow, but that he acted without fraud, and gave a *bona fide* consideration; yet as Olcott was at that time unable to discharge his other debts, as alleged and sworn to by the plaintiffs, the sale is annulled, as in fact, made in fraud of creditors.

From this Dow appeals, and avers, that it could not be enquired into in the present case, whether Olcott was able or not to pay his debts—1st. Because only one of the plaintiffs proved himself a creditor, and one alone cannot sue for a surrender of his debtor's property, and a rescission of all previous acts. See *Civil Code*, 294, *sec.* 168. For a forced surrender, there must be all or some of the creditors to require it; and though a debtor be unable to pay his debts, one creditor has no right to wrest property out of another creditor's hands, whatever the mass of the creditors might be able to do, if they sued to have it brought into the general fund. 6 *Martin*, 577.

2. Because there was no allegation of Olcott's insolvency, nor was it sworn to, and therefore it could not have been put in issue. The allegations were insanity in Olcott, and undue influence exercised by Dow. It is indeed added, that inasmuch as the sale is without any good consideration in law, and fraudulent as to all the creditors of Olcott, it ought to be rescinded; but the reason why fraud is not alleged, and the sale being fraudulent,

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can only be a conclusion from some previous allegations.

3. Because Olcott was never made party to the suit, nor cited to appear, though his rights were to be so vitally affected by the judgment rendered; it was not pretended that he had absconded; he was known to be in the city; he was recognised by one of the witnesses on the trial, as being present (which shews the nature of the present cause) yet as he was never made party to the suit, no judgment of sanity or insanity, of solvency or insolvency, could be pronounced concerning him. 6 *Martin*, 577. No property of his could be under the control of the court, and none could be ordered to be surrendered, if he could not be properly adjudged insolvent. The bill of sale from him to Dow could not be rescinded, for that is the ground upon which the judge annulled the sale. There must be a judgment against Olcott before there can be a judgment against Dow, and there cannot be a judgment against Olcott until he be cited.

The defendant Dow further avers, that there is no proof of Olcott's insolvency. The first thing presented to us is the bill of sale,

in which he conveys to Dow all his claims, interest, rights and debts, dues and demands, of all and every nature whatever, in, and belonging to the business conducted by N. Olcott, in No. 15, Toulouse-street; and it has been contended, that this being a conveyance of all his effects, and stock in trade, of itself makes him insolvent; but in the first place it is not proved that he had no other business in another street, or in another part of the state, or the world. Because a man ownsa grocery store, I believe he is not precluded from being master of a plantation, owning ships, hiring out negroes, &c.; and this exclusive concern of Olcott's ought to be proven; it can never be presumed, especially where so serious a thing as fraud is charged. It has been decided in the English courts, that the conveyance of all a man's property is an act of bankruptcy, because he thereby becomes totally incapable of trading; yet if made for valuable consideration, he may be as rich, or richer than before. A man may become a bankrupt, yet be able to pay twenty-five shillings in the pound. See *Doug. Rep.* 91. To be a bankrupt is not to be insolvent.

Say then that this was all his effects, and

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stock in trade—he might, under the English statute, have been declared bankrupt, though still solvent; but here it is necessary to prove that this would render him insolvent; he may have effects and stock, not in trade, and therefore, this conveyance being for good consideration, is not of itself a proof of insolvency.

The only thing remaining that can be tortured into any meaning concerning the incapability of Olcott to pay his debts, is the testimony of Charles Lee, who received a note of hand, drawn by Olcott, in payment of a negro purchased; and when the note became due, application being made by Lee at the store, he was informed that Olcott was sick; and his clerk, moreover, informed him, that Olcott would not pay the note. A few days afterwards Lee saw Olcott, and agreed to take the negro back, and give up the note, which was accordingly done; no reasons are stated why Olcott refused to pay the note; whether, because he considered the negro as not worth the money, or because he was not in funds. From the subsequent arrangement it appears, however, that the note is paid, and that he had property enough to pay it, even

after the sale of all of his effects in trade to Dow.

That Kenney is creditor for between four and five hundred dollars, has been proved; but one may owe a great deal, and yet be rich; and the being debtor for four or five hundred, or thousands of dollars, does not make a man insolvent; he must be unable to pay the amount, and of this there is no proof; no witnesses testify that any demand was ever made upon Olcott for Kenney's claim; or that if judgment was obtained against him, there would not be sufficient property to seize. There is no evidence of there being executions against him, numerous debts hanging over him, or that the man was ever distressed for money.

There is then no proof of Olcott's insolvency. Again, this defendant avers, that even were there proof of Olcott's being, at the time of the sale, unable to pay his debts; yet, as it was made for valuable consideration, and without fraud on the part of Dow, it is valid.

Three things are required by the Spanish law before a transfer for valuable consideration, "*por titulo oneroso*, can be revoked and annulled, *to wit:* fraud on the part of the

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transferor, the knowlege of it on the part of the receiver, and that the fraud shall operate to the injury of the creditors, *y asi en la enagenacion por titulo oneroso se requieren tres cosas, fraude de parte del enagenante, y sciencia de el de parte del recibiente y el evento o sucesso del fraude en dano de las acreedores.*" *Curia Phil. lib.* 2, *cap.* 13, *sec.* 16.

Now, we admit for argument, that there was fraud on the part of Olcott, but there is no proof that Dow was knowing to any intention on the part of Olcott to defraud his other creditors; there is no proof that the store and book accounts were the only property possessed by Olcott, or that Dow knew that he had not sufficient to pay his other creditors; there is even no proof that Dow knew he had other creditors; and unless these be proved, it is not a fraudulent transaction on the part of Dow. The judgment of the parish court has freed him from the imputation of any intentional fraud; and we have just seen, that there must be this intentional fraud proven, to revoke the sale. The court below has said, that it is enough that Olcott was unable to pay his other creditors, but our law is otherwise.

Aunque es visto dar en fraude el deudor, que

sabe que tiene acreedores, y que sus bienes no son deficientes para pagarlos y los enagena, no as suficiente para ser participe de fraude el comprador de ellos que deba tener el vendedor acreedores, sino es que tanbien sepa qua sus bienes no son suficientes para pagarlos." *Curia Phil. lib.* 2, *cap.* 13, *sec.* 17, and authorities there referred to.

Nor does it make any difference whether the consideration arose and passed at the time of the transfer; or whether it was a debt already existing, which was given up therefor, for an *enagenacion por titulo oneroso*, is *quando por el no se da de gracia la cosa, sino por algo que por ella se da, como en la compra, permutacion, y otras cosas semejantes.*" *Same book, sec.* 18.

And the case put by *Domat* in his *Lois Civiles*, is one of payment of an antecedent debt. See also 5 *Part.* 15, 19. *Domat*, 219, *sec.* 12, and the authorities is there put.

To this statement of the law, it may however be objected, that it is altered by the 24th section of the statute, relative to the voluntary surrender of property, passed in 1817; by which it is enacted, that "any debtor who shall be convicted of having at any time within the three months next preceding his failure, sold, engaged or mortgaged any of

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his goods and effects, or having otherwise disposed of the same, or confessed judgment, in order to give an unjust preference to one or more of his creditors, over the others, shall be debarred from the benefit of this act; and the said deed or acts shall be declared null and void; provided, however, that if the purchaser of such property shall prove that the said property was either sold or engaged to him for a true and just consideration, by him *bona fide* delivered at the time of such deed; then and in that case the said sales and mortgages shall be declared valid."

But this section applies only to persons who wish to avail themselves of the act; the words, "they shall be debarred from the benefit of this act, and the said deed or acts shall be declared null and void," shew that this was the intention of the legislature, more especially considering the previous statute of 1808, which was made for the benefit of persons confined for debt, as the statute of 1817 was for those not in actual confinement. The law of 1808, expressly declared, that it must be in contemplation of taking the benefit of the act, otherwise the conveyances, acts, &c. would not be affected. *Mart. Dig.* 455, *sec.* 16.

Under this law the debtor must not only be suing his creditors agreeably to its provisions, in order that any assignment, made within three months previous, should be annulled; but he must at the time of the assignment have had it in his mind, that he would shortly take the benefit of the law. This was found very difficult to prove, and therefore, when a law was made for debtors, not in actual custody, who whished to free their persons from imprisonment by surrendering their estate, these words were omitted; but it was never understood that the law of 1817, was a repealing law, and that of 1808, was at all affected by it. Yet, if the 24th section is to be considered as applying, not only to debtors voluntarily surrendering before in custody, but to all debtors insolvent, the 17th section of the law of 1808, is a dead letter, and is repealed, without any repealing clause in that of 1817; this construction is not to be admitted if it is possible to reconcile the two sections, one with the other, *ut res magis valeat quam pereat*, and they are not at all contradictory, if we suppose the section of the statute of 1817 to apply only to those debtors who are seeking relief under its provisions; and this its very

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wording fully shews; for in the same breath, it declares that the debtor shall be debarred the benefit of the statute, and the act shall be annulled: what use of talking about debarring him, if the legislature had not petitioners under this law, alone in contemplation? If this be the case, as Olcott has never voluntarily surrendered either in custody or out of custody, neither law is applicable to him.

Again, the consideration was "a true and just one, *bona fide* delivered at the time of such deed." Dow released him from a debt of $1400, which was justly owing to him at the time; and this in good faith, agreeably to the evidence in the opinion of the judge below, and Olcott's estate was benefitted to that amount, as it was released from the burthen of the debt.

These things being considered, the defendant asks for a reversal of the judgment of the parish court.

Morse, for the plaintiffs. The petitioners state, that they are creditors of Olcott. That he has, within a few days, manifested evident symptoms of a deranged mind, and has actually, in consequence of the influence and improper persuasion of Timothy Dow, one of his credi-

tors, sold the whole of his effects, and stock in trade, to said Dow; and they believe, had he been at the time in his proper mind, he would not have executed the said sale; and inasmuch as the said sale is without any good consideration in law, and fraudulent against all the creditors of said Olcott, they pray that said property be sequestered, provisional syndics appointed, that Dow be cited, the sale annulled, and other equitable relief. And the petitioners, in order to obtain the sequestration aforesaid, severally make oath to their alleged claims.

The court below gave, as its opinion, that the symptoms of insanity in Olcott must be attributed to momentary abuse in drinking liquor, and not to real insanity. I think in this point it erred, and in order to shew this, shall have recourse to the testimony on record.

The first in order is Mr. Goodale, a respectable merchant of this city; he swears that in a conversation with Dow, the defendant, the said Dow stated, that Mr. Olcott appeared to be deranged, and had lost his mind, which Dow seemed to regret; and deponent avers, that in his opinion, on the day

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of the conversation, Dow was under the impression and belief that Olcott was not able to conduct his business at that time. The deponent further understood from Dow that he had made some advances to Olcott, and had taken his store. Here is an explicit avowal of the defendant, that he himself believed Olcott to be deranged, and he had then, as he further states, taken Olcott's store.

Pierre Musson also saw Olcott about the time the transaction took place between him and Dow, and believed, from his extraordinary conduct, he was deranged, and that it was not caused by drink.

M. Md. Pellé states, that he had many occasions to see Olcott; had transacted mercantile affairs with him. That he knew him in business; he was not in the habit of drinking; and that when he saw him, his mind was deranged, and he had not been drinking.

Mr. Hewes, from the conversation he had with Dow, was impressed with the belief that Olcott was a little deranged; but Dow subsequently told him that Olcott was subject to intoxication.

The testimony of two of these witnesses goes clearly to shew that Dow himself, at

the time of this pretended sale, was under the impression of Olcott's insanity; and that of the other two established the fact of his derangement from their personal observation, and contradicts the presumption of its being caused by drink.

The only reasons then, upon which the judge could have formed his conclusion, must have been drawn from the testimony of Lee and Devereux, the clerk; and Lee's opinion is drawn from Devereux's. He lent Olcott some money, and on inquiring for him some days after, he thought he was somewhat irregular; and questioned the clerk, Devereux, who answered it was nothing but liquor; and Dow made the same answer. On inquiring some time after, he was told Olcott was unwell. He had known him for four years, and had always found him sober and correct before this last transaction; was but twice in his company; and then considered him a sound man.

Devereux states, that he slept in the same room with Olcott, and has considered him a man of sound mind since he had known him; and further, that about the time of sale, he never observed any derangement on the part

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of Olcott; on the contrary, always considered him as a sane man.

Madame V. Evan deposes, that Devereux told her directly the contrary. She expressly states, that Devereux told her that Mr. Olcott was crazy, and that one evening said Devereux requested deponent to procure him a bed, because he was afraid to sleep in the same room with Olcott; that she then procured a bed and he slept in the house. This, she stated on the trial, took place four months previous, which fixes it at about the time when the transfer was made to Dow. Deponent also knew that Olcott was insane from her own observation.

Mr. James Henry states, that he knew very little of Mr. Olcott, but believes his insanity was caused by intoxication; and for this sage reason, "That if he were intoxicated to-day he would appear insane to-morrow." Were this a fact, I am fearful the list of interdicts would be very considerably increased.

The testimony then of Goodale, Musson, Pellé, Hewes, and Madame Evan, strongly affirms the fact of Olcott's insanity and character for sobriety, at the time of the transaction. That of Lee's, which is but barely

negative and forced, upon the say-so of Devereux's, demands but little consideration; and as to Devereux, it only rests with the court to decide who is entitled to the most credit, he or Madame Evan. Their testimony is so diametrically opposite, that the verity of the one establishes the falsity of the other. But, supposing it is admitted that Olcott was occasionally intoxicated, does that destroy the fact of his insanity? On the contrary, I think it affords one of the strongest evidences of it. Insanity acts variously with different constitutions; almost every deranged person is seized with a different fancy; liquor was his. Insanity may cause a man to drink, and drink may cause a man's insanity.

On the trial in the court below, the defendant's counsel objected to the admission of so much of this testimony, as went to prove the insanity of Olcott, on the ground, that as there was no judgment of interdiction against Olcott, no act of his could be annulled for insanity until then. The court over ruled the objection, whereupon he took a bill of exceptions; but in his argument before this court, he has not referred to this objection; he has produced no law to support it, and it cannot

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be maintained. In the case of *Marie* vs. *Avart's heirs, n.* 1, *vol.* 10. *Martin's Rep.* pamphlet form, it is decided, that an heir may avail himself of a testator's insanity, although his interdiction was not procured.

And indeed, it is but reasonable, that in a living person, all acts of his while *non compos*, should be null; although no formal interdiction had been passed or even provoked; for, how are we to judge of his insanity, but from some previous act; and the one previous act might be so extensively ruinous in its consequences, as to involve the whole estate of the unfortunate. Again, he may have no relations or friends, and a stranger might not feel sufficiently interested to take upon himself the trouble and expence incidental to such an application. The object of the law of interdiction is to give public notice of the fact. All acts entered into by a person proved insane at the time are as absolutely null and void, as if he had been formally interdicted; for consent being the essence of a contract, it follows that a person must be capable of giving his consent, and consequently, must have the use of his reason, in order to be able to contract. 1 *Poth. on Obligat.* 29.

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Having disposed of this point in the case, there only remains this question to be discussed: Should the judgment of the parish court, in setting aside the sale as fraudulent, be affirmed? On this point, there can be but little doubt. The appellant in his argument, for many reasons, avers, that Olcott's insolvency could not be inquired into in the present case:—Because, 1st, only one of plaintiffs proved himself a creditor, and one alone cannot sue for a surrender of his debtor's property, and a rescission of all previous acts, and cites *Civil Code*, *p.* 294, *art.* 168, and 6 *Martin*, 577. On referring to this passage in the *Code*, we find that a forced surrender is ordered at the instance of some of the debtor's creditors. The appellant's counsel has not given to this suit a distinct and proper character; it was instituted by three creditors of Olcott, to obtain a sequestration of his property, fraudulently obtained; who supported the allegations in the petition, and respectively made affidavit to the amount of their claims. This was the proper manner of bringing the action, and the only formality required by law. It is admitted, that in the course of the trial, Kenney fully proved him-

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self a creditor; this was sufficient to establish the fraudulency of the conveyance, supposing Olcott to have disposed of all his effects, and left Kenney's debt unliquidated. *Robt. Fraud. Con.* 546. The case in 6 *Martin*, 577, is no way analagous to the present. Because, 2d, there was no allegation of Olcott's insolvency, nor was it sworn to; and therefore it could not have been put in issue. The petitioner alleges that Olcott, in consequence of the influence and improper persuasion of Timothy Dow, one of his creditors, sold the whole of his effects, and stock in trade, to said Dow. The transferring the whole of his effects to one of his creditors, without making any provision for the others, is surely allegation sufficient from which to draw a conclusion of fraud; and we also find the fact itself a very strong evidence of insolvency; for the whole of his effects conveyed to Dow, did but satisfy his claim in part. Dow was a creditor for upwards of $1800, and for all his property, Olcott was only credited in the sum of $1400. I shall here notice an objection, on which the appellant appears strongly to rely, and which runs through the whole vein of his argument. He says, that the bill of sale barely shews,

that Olcott disposed of all his effects, claims, &c., in the business, No. 15, Toulouse-street; and to prove his insolvency, we ought to shew, contrary to every rule of evidence, that he had no other property. No plantation, no ship, no negroes hired out, and many other negations; for, he believes, because a man owns a grocery store, he is not precluded from being master of a plantation, ship, &c. Certainly not, I believe so too. But when a public trader conveys all his effects, claims, and credits of, in, and to that trade, to one creditor, and all of which only extend to a partial satisfaction of that one claim; when he leaves other debts unliquidated and unprovided for; debts which were incurred for and in the course of that trade; this furnishes a violent presumption, that he has no more property; that he is insolvent. It is, indeed, conclusive, and when we make this allegation, it rests with the party affirming, that he has other property, to shew it. Produce it; prove by actual demonstration that he still possesses more than sufficient to pay all his debts, and we shall be defeated; and it is only in this manner that the fact can be brought to light. If this trader had applied

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for the benefit of the insolvent act, and we had opposed his release, charging him with possessing more property than his schedule exhibited, here we must have ferretted this property out; but in the present case, we have proved that Olcott disposed of all his visible effects; that they, not being sufficient to pay his debts, *de facto*, he is presumed insolvent; and it was then for this defendant to destroy this presumption, by shewing he possessed other property sufficient to satisfy all claims. This would have bettered their condition, and this it was incumbent upon them to have proved. When money is paid to a fair creditor, in the usual course of trade, nothing attends the transaction which can have any tendency to excite suspicion of fraud or injustice on the part of either party; but in cases, where instead of payment, some security is offered, this very circumstance creates a violent presumption that the debtor is not able to pay his debts, and that he is about to fail. 3 *Martin's Rep.* 274. *Robert's Fraud. Con.* 546. The third ground taken by the appellant, is an objection that Olcott's rights are so vitally effected that he should have been made a party to the suit. This, if an error, can only

be attacked by Olcott, and cannot be urged by the defendant. The question here is, whether his claim should not be remitted to its primitive rank, and paid in concurrence with the other creditors?

Although our refutation of the second ground of the appellant's argument, should render any further proof unnecessary, yet to establish beyond all doubt, the insolvency of Olcott, we shall have recourse to the parol testimony; and here the evidence of Charles Lee need not be tortured to this meaning; the fact of which he swears, is clear and conclusive evidence of itself. He made a *bona fide* sale of a negro boy to Olcott, and took his note for the payment; when the note became due, he applied for payment, but the boy stated that Olcott was unwell, and the note could not be paid; and that Olcott had sold his store to Dow; and this boy, Devereux, in his examination, very gravely states, that the reason of Mr. Olcott's not paying his account was, the inconvenience of not having the money. This is surely a sufficient reason, and makes good our allegation; for it is this inconvenience of not having money, that is the essential cause of insolvency. The counsel states, no reason has been given why Olcott refused to

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pay the note; it was not for us to give this reason; it is presumed, that at that time he was troubled with that same inconvenience. The counsel further says, it appears, however, that the note is paid. It does not so appear. When Lee found he could not get the money for the note, his suspicion was excited; by the subsequent irregular conduct of Olcott, they were confirmed; and he very prudently thought it better to regain his negro boy, his identical property, than run the hazard of obtaining what might have been considered a good price for him.

We will now shew, that Dow himself never considered this pretended sale as binding and effective in law.

Devereux, the clerk of Olcott, states that Olcott was indebted to Dow $1800. Dow, at the meeting of the creditors ordered by the court, makes oath that Nathaniel Olcott is justly indebted to him in the sum of $2099 82 cents. He subsequently filed with the clerk of the court, his account against Olcott, amounting to $2106 52 cents; and swears to its correctness. These acts of his evince that he considered the sale a nullity; for how could Olcott pay him by this sale $1400, and

still be indebted to him in the full sum of this account? It is not pretended there was more than this one account; that any subsequent transaction swelled the sum to its former bulk. The act of 2d of March was a final one. Two thousand dollars, or thereabouts, were the original debt; fourteen hundred dollars of that debt have been paid, and yet, by a novel system of arithmetic, twenty-one hundred dollars remain due.

PORTER, J. This action appears to have been commenced with a double object; to have Olcott declared a bankrupt, and to obtain the rescission of a sale of property made by him to Dow, on the ground that he was insane at the time he made the conveyance; and "inasmuch as it was without any good consideration in law, and fraudulent."

I doubt very much, even under the equitable and liberal practice which our law authorises, if two such causes of action can be properly joined in the same petition. It seems to me, that it must necessarily introduce great confusion, to permit demands, founded on distinct causes, to be carried on against different defendants in the same suit; but I give no opinion on this point, because the defect, if it does

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exist, is cured by the parties not objecting to it at the proper time.

Dow was cited to answer this petition; Olcott, the other defendant, was not; the former appeared, and the action for a rescission of the sale proceeded against him; evidence was taken, and the parties heard. The court decided that the transfer of the property was null and void, and followed up this decree, by an order that a meeting of the creditors of Olcott take place before a notary. From this judgment Dow has appealed.

The record contains not only the evidence on which this decision was made, but also the subsequent proceedings had against Olcott, which terminated in ordering a forced surrender of his property. The greatest doubt I have had in this case is, whether we were not authorised to notice the fact of this insolvency; but on reflection, I am satisfied that as it did not make a part of the evidence, on which the court pronounced judgment below, we cannot notice it on the appeal.

The first point made by the appellees is, that there is sufficient proof that Olcott was insane at the time he executed the bill of sale to the defendant.

The evidence on this head is in substance as follows:—

Goodale, the first witness, declares that Dow told him Olcott appeared to be deranged.

Masson deposes, that Olcott was not of quiet mind, and deranged; and his reason for thinking so was, that Olcott called for paper and ink, and wrote and tore about eight or ten pages, and asked a lad of 13 or 14 years of age, if a certain account he had drawn was correct.

Pellé states, that he met Olcott in the street in the month of March, that he was "extravagating," offering to give his store to the deponent, and requesting him to stop at a tavern and drink with him, which he did; that he had occasion to see him five or six days after, and he was in the same situation of mind.

Lee declares, that he had lent Olcott some money, that he applied a few days after for it, and thought Olcott was somewhat deranged; he made enquiry of the clerk, who answered it was nothing but liquor; he mentioned the same thing to Dow, who made the same answer; that some days after the deponent applied at the store for payment of a

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note he held for a negro boy; he was informed it could not be paid. A week afterwards he made an arrangement, and took back the boy. Olcott appeared of sound mind when this transaction took place, though he drank too much.

Hewes swears, that Dow told him in the beginning of March, that his impression was, that said Olcott was a little deranged, and unable to attend to his business. And that in a subsequent conversation, he told the deponent that Olcott was subject to intoxication.

Devereux, the clerk, states, that Olcott is a man of sound mind since he has known him; that he is given sometimes to drinking, that he and Olcott slept in the same room, and that he has seen him drunk at the rate of three times a week.

This last witness is contradicted by one Madame V. Evan, who appears to stand in a situation, in relation to one of the plaintiffs, not very favourable to her credibility.

I agree with the parish judge, that this evidence is not sufficient to establish the insanity of the vendor. The fact must be notorious, and it must be clearly proved. *Code* 80, *art.* 15.

But all I can gather from the testimony is, that he was a drunkard, and that like other men, when in that situation, he talked and acted very foolishly.

The appellees next insist, that the sale was without consideration, and void against creditors.

Had it appeared in evidence, that Olcott was insolvent, or had been declared a bankrupt, a very strong case on the part of the plaintiffs would have been made out; but nothing of this kind is shewn, and of course, none of the provisions of the law which relate to sales made, or preferences given to favourite creditors, on the eve of bankruptcy or insolvency, can apply here; as that bankruptcy and insolvency have not yet been established according to law.

If then the plaintiffs can succeed, they must do so in consequence of rights which the law confers on them, independent of these circumstances of failure or insolvency. One of the rules prescribed for the exercise of those rights is, that to set aside the alienation, three things must be proved; fraud on the part of the vendor; knowledge of that fraud by the person to whom the alienation

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was made; and an actual injury to the other creditors. *Curia Phillippica, Commercio terrestre, lib.* 2, *cap.* 13, *n.* 16, 17. The evidence does not establish these facts, and the case of the plaintiffs is not made out.

We have been referred to the decision of this court, in *Brown* vs. *Kenner & al.* 3 *Martin*, 270, but in that case as well as *Meeker's assig.* vs. *Williamson & others syndics*, 4 *Martin*, 625, the insolvency of the vendor had been established before suit was brought, and the opinions given there were predicated, on the ground, that the conveyances were made on the eve of bankruptcy, and with a view to it.

I am therefore of opinion, that the judgment of the parish court be reversed, and that judgment be given for the defendant, as in case of non-suit, with costs in both courts.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment for the defendant, as in case of non-suit, with costs of suit in both courts.

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DAVID vs. *SITTIG.*

Evidence of the nonage of the defendant, cannot be received on a motion to discharge him from bail.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. This case comes up on an appeal, taken from an order of the judge of the inferior court, discharging the defendant out of custody of the sheriff, on the ground that he was a minor at the time he entered into the contract on which this suit was instituted.

This action it appears, was commenced to obtain payment of notes and obligations executed by the defendant. The only defence set up is the minority of the obligor at the time he signed them.

The evidence introduced to establish the minority, admitting it to be legal, shews that Sittig was twenty-one years of age at the time he was arrested. That arrest was therefore lawful, and if he had not the means of giving bail, he should have remained in the custody of the officer to await the final judgment of the court.

The ground on which the parish judge discharged the defendant, made a part of the merits of the case; or rather it was the only point on which the parties were at issue; so that on an interlocutory motion, he in fact

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tried the cause and decided it. This was clearly incorrect, and if sanctioned by this court, would tend to introduce confusion in practice, and be often a source of the greatest injustice. In the present case, it is not impossible that when the parties come fully to trial, the defendant may be proved of age, and if so, his discharge from prison now might work an irreparable injury to the plaintiff. I think that the judgment of the parish court should be annulled, avoided and reversed, that this cause should be remanded with directions to the parish judge to proceed in the case as if no rule had been prayed for and granted.

MARTIN, J. This case is nearly similar to that of *Fisher & al.* vs. *Hood*, 2 *Martin*, 113, determined in the superior court of the late territory of Orleans, in which the merits of the case were attempted to be brought before the court, on a motion to dissolve the attachment, by shewing that the debt was not due.

The merits of a case cannot be pronounced upon on a motion; the party has a right to a trial by jury. The judgment ought to be reversed, the case remanded, and the court *a quo* directed to proceed as if no rule had been granted.

MATHEWS, J. I concur with my colleagues.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and the case remanded, with directions to the parish judge to proceed therein as if no rule had been granted.

Seghers for the plaintiff, *Davezac* for the defendant.

CARROL vs. *M'DONOGH.*

APPEAL from the court of the first district.

In cases of attachment, a prior judgment does not destroy the lien of an anterior seizure.

Maybin, for the plaintiff. An attachment was instituted and executed on funds in the hands of John Rogers, the appellant. To the interrogatories proposed him by the plaintiff, he answers, that he has in his possession monies of the defendant, to the amount of $334 82 cents; but that an illegal attachment had been taken out in the state of Pennsylvania, against his own property, in a suit of some person against M'Donogh, and that he intends retaining possession of the funds to indemnify himself for any damage which he may sustain. The district court rendered

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judgment in favour of the plaintiff, against the defendant, and ordered Rogers to [illegible] the amount of the monies attached in his hands; which order, not having been obeyed, execution has been issued against the garnishee. From the decree of the inferior court, an appeal has been taken by Rogers, the defendant having acquiesced in the judgment.

The ground relied upon is, that the garnishee has a right to retain the funds in his hands, till the suit in Pennsylvania is decided, to indemnify himself against its result. His answers expressly admit, that the assignment is illegal. But waving that point for the present; admit it to be legal; and that it is not sufficient to prevent him from paying over the money in his possession. The decree which rendered the decree against Rogers was one of competent jurisdiction; and a compliance with its judgment will always afford him protection, and be a valid payment, bar in any other suit. The payment of the money would not be voluntary, a circumstance which might elsewhere perhaps raise a presumption of collusion; but made in execution of an order expressly rendered against him

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If the court had undoubted jurisdiction of the case, and gave a decree on the whole merits of it, the garnishee is bound to obey it; and that obedience will always prevent him from sustaining any injury. In the case of the assignees of *Dorney* vs. *Lynch & al.* *Douglass*, cited in *Sergeant on Foreign Attachment*, 183, and 3 *Term. Rep.* 125, *Allen* vs. *Dundas*. The language employed by Mr. Justice Ashhurst, is particularly applicable to the case before the court, "every person is bound by the judicial acts of a court having competent authority, and during the existence of such judicial act, the law will protect every person obeying it." It was distinctly admitted in argument, by counsel in the case of *Hunter* vs. *Potts*, 4 *Term. Rep.* 187; "That nothing could be more clear, than that a person who had been compelled by a competent jurisdiction, to pay the debt once, should not be compelled to pay it over again." This point I consider so clear that it would be a waste of time to adduce any additional authorities.

It is not a sufficient plea that an attachment had been instituted against the garnishee in Pennsylvania. No evidence has been presented to the court, to shew that the

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suit is still pending, it may, long ere this, have been discontinued or dissolved by the court, or judgment rendered in favour of the defendant; which would consequently, exonerate the present garnishee from all responsibility. He should have gone further than plead the existence of an attachment; he should have plead and proved, that a judgment had been rendered against him, and an execution issued. *Dyer*, 83, *a*. *Rotherton* vs. *Mervin*. 1 *Comyn's Digest*, 427, (Dublin edt. of 1765.) But the garnishee admits, that the attachment in Pennsylvania is illegal. If so, what plea can he now set up against obeying the decree of the inferior court? An illegal suit cannot affect or injure him. As regards him, it is the same as if no suit was in existence at all. The answer of Rogers is to be considered as true unless disproved—this has not been done in the present instance. This court will, therefore, look upon the suit in Pennsylvania as entirely illegal; for the garnishee himself says so. How then can an attachment, which is here shewn to be against law, and of course, altogether inoperative, be a valid plea in bar against the recovery by the plaintiff in this present suit? The garnishee

has, by his own answers, shewn reason to authorise this court to confirm at once the judgment of the court *a quo*.

In the statement of points and authorities submitted by the counsel for the appellant to this court, two provisions of our *Code* are relied upon in support of the ground taken by him. See *Code*, 414, *art.* 28. *Ib.* 289, *art.* 342. The former of these articles relates to the obligations imposed upon him, by whom a deposit has been made, and gives the depository a right to retain the deposit, until repaid his advances, and indemnified for his costs and losses by the owner. In what manner this part of our law is applicable to the case before the court, I am yet to be informed. The garnishee must shew in what way the circumstance of his being indebted to the defendant, is to be considered a deposit; and then, that he has sustained the losses and incurred the expences alluded to by our *Code*, to authorise him to retain the money, in preference to a *bona fide* attaching creditor. Nothing of this has as yet been done, and I apprehend it cannot very easily be done.

The other article of the *Code* invoked, has little bearing on this case. That refers

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declares, that "payment made by a debtor to his creditor, to the prejudice of a seizure or an attachment, is not valid with regard to the creditors seizing or attaching; they may, according to their claims, compel him to pay anew," &c. This provision evidently contemplates a case different from that under consideration. It contemplates a payment to be made voluntarily by the debtor, after an attachment, and after his knowlege of the existence of such an attachment or seizure; but surely it cannot mean a payment made under a decree of a court of competent jurisdiction. *Pothier, Traité des obligations*, n. 469, has a similar provision; and his meaning, as gathered from the article itself, and the context, is that which I have given to the article in the *Code*. The debtor must know of the laying of the attachment, and must voluntarily pay it under that knowlege; and this being a fraud, and to the prejudice of the attaching creditor, the law very correctly says, that he shall be compelled to pay it a second time. Our *Code* goes also on the supposition, that the attachment, to whose prejudice the payment is made, is a legal one. Now, in our case it is illegal, as declared on oath by the

garnishee; consequently, it never could be prejudiced, even admitting that the article invoked is applicable.

Preston, for the garnishee. Rogers shews by his answer, that an attachment had issued against him in the state of Pennsylvania, on account of the funds now attached, and that he would hold the same to indemnify himself against it.

Our *Civil Code* declares, that "payment made by a debtor to his creditor, to the prejudice of a seizure or attachment, is not valid with regard to the creditors seizing or attaching. These may, according to their claims, oblige him to pay anew." The counsel for the plaintiff contends that this article of our *Code* applies to a voluntary payment, not one compelled by a court of justice. But this is evading the controversy between us. The question is, whether the court ought to compel the payment or not? I contend that the court ought not. The payment, if made voluntarily, would not be valid. The reason is, because the debtor ought not to pay, and thereby do injustice to an attaching creditor who had acquired rights in the debt or thing attached.—But if the debtor ought not to pay voluntarily,

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the court ought not to compel him to pay. Neither ought the court to do injustice. But if they compel the garnishee to pay the present attaching creditor, they must do injustice either to the garnishee, or the first attaching creditor: to the first attaching creditor, if they deprive him of his debt, by compelling the garnishee to pay the present plaintiff; or to the garnishee, if by compelling him to pay the present plaintiff, they subject him to pay the same debt twice. The law of atttachment makes it the duty of the garnishee to defend himself against the attaching creditor, and to protect the rights of the defendant, and of course the rights of a previous attaching creditor. It is not sufficient to exempt him from their rights, that he has been compelled by a court of justice to pay the attaching creditor; he must have been compelled to pay, after having defended himself according to law. To make such defence is the object of the present garnishee.

If the garnishee be compelled to pay the present plaintiff, it will not exempt him from the effect of such payment prescribed by our *Civil Code*. "He may be obliged to pay anew." His answer shews that judicial pro-

di[illegible] was pending against him in Penn[illegible]ania, on account of the funds now attach[illegible]. His answer, by our statute, is made evi[illegible]ence of the existence of those judicial pro[illegible]eedings, and supplies the record itself. His answer that he was indebted by judgment, would bind him, and he would not be exempted from payment because the record was not produced. On the other hand, if he discharged himself by judgment, or other judicial proceeding, it is sufficient, and it is not necessary to produce the record. The answer of the garnishee is sufficient proof that the funds now attached had been previously attached in the state of Pennsylvania. Now the constitution of the united states prescribes, that "full faith and credit shall be given in each state, to the judicial proceedings of every other state." art. 4. *sec.* 1. The attachment in Pennsylvania therefore, is entitled to the same credit as if it had been commenced in our district court. If the attachments had been commenced here, the first attaching creditor would have had a preference on the thing attached. 3 *Martin's Rep.* 511. The judicial proceeding in Pennsylvania, therefore, gave the attaching creditor there, a preference over the at-

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taching creditor here. This court cannot deprive him of that preference without violating the article of our constitution just quoted. If this court should deprive him of that preference, the court in Pennsylvania would regard the act as manifestly unconstitutional, and would not only in fact, but rightfully compel the garnishee to pay anew. They would tell him it was his misfortune to have been in Louisiana, where the constitution of the United states was disregarded; but that they could not do injustice to their citizens on account of his misfortunes.

The fact, that judgment has been first obtained in our state, does not affect the rights of the parties. It is not the judgment but the attachment which gives the lien. If two creditors should attach the same thing in the district court, and the first, on account of the difficulty in obtaining his proof, should be the last to obtain judgment, would he be postponed to the other? If so, the vigilant creditor who hunted out the concealed property of the absconding debtor, would subject himself to costs, to see another enjoy the benefit of his industry. The maxim of justice *vigilantibus non dormientibus servit lex*, would be reversed.

The principle for which I contend, has often been decided. A garnishee may plead the pendency of the attachment in bar to or abatement of a suit, commenced against him by the defendant in the attachment. *Serg. l. of att.* 145, 146, 147, and the cases there cited; and 169, 170. The defendant then has no right to the thing attached, until the attachment is dissolved. But the second attaching creditor can only attach the rights of the defendant to the thing—the right to receive it when the first attachment is set aside. The authorities quoted, therefore, in deciding the principle, that the defendant in the attachment cannot maintain an action for the debt or thing attached, against the garnishee, in effect decide, that the second attaching creditor can acquire no right to it until the first attachment is satisfied or dissolved.

Again, the garnishee (as appears by his answer) does not owe the defendant money, but is only in possession of his funds. The money of the defendant must be in his possession by contract of deposit or mandate.—In either case the garnishee is entitled to indemnity for any losses he may sustain on account of the deposit or mandate. The de-

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positor "is to indemnify the depository for the losses which the thing deposited may have occasioned him. The depository may detain the deposit until repaid what he has advanced, and indemnified for his costs and losses by the owner." *Civil Code*, 414, *art.* 28. "The attorney must also be compensated for such losses as he has sustained on occasion of the management of his principal's affairs, when he cannot be reproached with imprudence." *Civil Code*, 326, *art.* 30. It is true, the loss has not yet actually occurred, but suit has been commenced against the garnishee, which renders its occurrence at least so probable as to entitle him to security against it. *Serg. l. of att.* 169.

Some stress is laid on the circumstance, that Rogers himself believes the attachment in Pennsylvania illegal. That is not for him but for the court to decide. The court may think it a legal attachment, although he may believe it very illegal. Whether it be legal or illegal, he will have the money to pay if the court so decide; and he is equally entitled to indemnity for the loss sustained on account of the thing in his possession, whether by a legal or illegal attachment.

The garnishee acknowleges, in his answer, to have funds of the defendant in his possession, but claims to be discharged at present from the payment of them to the plaintiff. If his claim was not admitted, he was entitled to notice of the day of trial, in order to support it. *Allyn* vs. *Wright*, 9 *Martin's Rep.* 271. The record shews he was not present at the trial, and there was not a witness examined, to prove that he was notified of the time. If he had been present, and his case had been presented to the district court, the judge surely would have required the plaintiff to have waited the event of the suit in Pennsylvania; or to have given the garnishee indemnity against it. I hope therefore the court at least will send this cause back, to enable the district court to afford this equitable protection to the garnishee, before rendering judgment against him.

The answer of the garnishee is not very explicit. He appears not to know precisely the nature of the proceedings against him in Pennsylvania. If I had counselled him with regard to that answer, I surely would have advised him to have obtained delay from the district court, to have procured, and set forth in his

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answer, copies of those proceedings. But that particularity was rather necessary for the plaintiff than for him. He set forth that a suit was pending against him. This was a substantial defence. If the plaintiff wished to know the particulars of the suit, he should have required a more particular answer to his interrogatories. If both have been a little negligent on this subject, and have thereby not afforded the court the means of knowing what is right, at least let the cause go back, in order that the record of the suit in Pennsylvania may be procured, that the court may be enabled to do that justice which will be satisfactory to them, and to the parties

Maybin, in reply. The counsel for the garnishee relies considerably on the 142d *art. p.* 288, *Civil Code*, for the purpose of proving, that payment by Rogers, under the judgment of the inferior court, will not be valid, as it regards the attachment in Pennsylvania. Nothing has, as yet, been urged to weaken the construction I have already given to this provision. The *Code* is describing the manner in which payments are to be made, and the effects of such payments. It is speaking of those made by the debtor to his creditor,

voluntarily; and nothing is said of their being done under judicial process. This article, I still contend, relates to a payment made by a debtor, after an attachment has been issued, after knowlege of the existence of such attachment, and with the view to injure the attaching creditor. But, says the counsel, "if the debtor ought not to pay voluntarily, the court ought not to compel him to pay." This does not follow. Here are conflicting rights. It is not the business of the debtor to decide. The question must be settled by the laws of the country. If then, the debtor undertake to pay one creditor voluntarily, he does that which the law will not permit him to do; and consequently renders himself liable to pay anew. But, because he cannot give a preference to one creditor, and cannot determine upon the respective rights, this surely forms no reason to prohibit the court from settling the question; and its judgment, as I have already endeavoured to shew, will always protect, and be a good plea in bar to the garnishee.

But the *Code*, in this article, is speaking of a payment to be made by a debtor to his creditor. The counsel himself admits, that the

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garnishee does not owe the defendant money; but is only in possession of his funds. This, of course, proves him not to be a debtor; if so, how then can he bring to his aid this passage of our law? If he be no debtor, the article is not in the least applicable; for it is speaking, exclusively, of payments made by debtors. Besides, when the *Code* says, that such a payment, made to the "prejudice of a seizure or an attachment, is not valid," &c.; it must surely allude to attachments instituted in this state. It can have no reference to those which are brought in other states, or in other countries, for our laws are not made for cases like those; their operation and effect are confined to the state by which they were enacted.

But the constitution of the united states is brought into action, and for what purpose? To shew that the court must give full faith and credit to the judicial proceedings of Pennsylvania. And what will be the extent of that faith and credit? Why, simply, that an attachment has been instituted against M'Donogh, at the suit of a creditor, in which Rogers' property has been seized. This is not denied. Nothing further can be inferred

by the court. The existence of the attachment is only proven at the time when the answers were made; and nothing is exhibited to shew that it is still pending, or what has been the result of the suit. But I am willing to give the fullest effect in this case to the article of the constitution. Rogers calls that attachment in Pennsylvania illegal. It is a judicial proceeding. Give it full faith and credit, and the consequence will be, that this court must decide that it is illegal; and of course, of no effect in this cause. If, as the counsel contends, the attachment in Pennsylvania is entitled to the same credit as if it had been commenced in our district court, then this court will pronounce it illegal. The garnishee says it is so in that state, it must be also illegal in this; consequently, it cannot affect the rights which the present plaintiff has acquired.

The money of the defendant must be in the possession of the garnishee by contract of deposit or mandate. How this is made out I cannot tell. No evidence is introduced to shew in what capacity, or in what manner he received the funds of the defendant. At all events, let him be considered either as a depo-

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sitory or as an attorney. What losses has he sustained? What advances has he made? And what costs incurred for the owner of the property? Nothing of this is exhibited to the court by the garnishee; till this be done, the articles of the *Code*, relied upon by him, will be of no service to his cause.

But his counsel contends, that the garnishee was entitled to notice of the day of trial, if his claim was not admitted. Our law requires notice to be given to a garnishee in only one case, and that is, where testimony is to be introduced concerning the interrogatories propounded to, and the answers of, the garnishee; and that notice must be reasonable. *Act of* 1811, *March* 20*th*, *sec.* 5. Now, in the court below, it was not the object of the plaintiff to endeavour to disprove the answers of Rogers. He was willing to believe them true; and as they were admitted to be correct, no testimony was introduced; and of course, no notice of the trial was necessary to be given to the garnishee. The moment he has filed his answers in court, his duty is at an end, except in paying the money over, under the order of the judge. If his answers are to be disproved, then he is entitled to notice, and for this

plain reason, that he is not to be condemned unheard. If the plaintiff acquiesced in this, the garnishee has done that which was required of him, and ceases to be any longer a party to the suit. As, therefore, testimony was not introduced to impugn the correctness of Rogers' answers, it became unnecessary to give him a legal notification of the time of trial of the cause. This is the ground of the decision of this court, in the case of *Allyn* vs. *Wright*, 9 *Martin*, 271.

If both parties, says the counsel, have been a little negligent, this court ought to remand the cause. Whatever negligence has existed in this business, it has been on the part of the garnishee; for, most undoubtedly, the plaintiff has been guilty of none. What are the facts of the case? On the 4th of November, 1820, the garnishee presented his answers to the court. A commission is granted to the plaintiff, to prove the debt against the defendant, it is to be executed in Philadelphia, it is executed and returned to this city, and in last May the cause is tried, and judgment rendered against the defendant and Rogers. What, in the mean time, is done by the garnishee, in order to protect himself? Does he

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send to Pennsylvania for an authenticated copy of the record of the suit in which his property was attached? While the commission of the plaintiff was executing in that state, had he not time sufficient to obtain evidence to be exhibited to the court below, in his defence? Nothing, however, was done. He seemed satisfied with his own answers; and, I presume, considered himself safe. Though it is not in evidence before the court, every indulgence was evinced by the plaintiff to the garnishee; and it is with a very bad grace that he can, in this court, allege a negligence on the part of the plaintiff. Nothing, I think, has been urged to induce the court to think that the decision of the district court is erroneous.

PORTER, J. Interrogatories were propounded in this case to the garnishee, for the purpose of ascertaining what credits and effects of the defendant were in his hands. He answered, that he had $334 82 cents, which he had ever been willing to pay over, but which he now intended retaining possession of, to indemnify him from any damages he might sustain from an illegal attachment, which had issued from a court in Pennsylvania, against

his property, in a suit of some person against the said M'Donogh.

There was judgment against the principal debtor, and an order that the garnishee pay over the amount due M'Donogh, in satisfaction. From this decree Rogers has appealed.

The appellee insists, that the decision rendered in the inferior court was correct, on two grounds:—

1. On the general principle, that it is not priority of suit but priority of judgment that gives a preference in the thing attached.

2. That admitting the position to be incorrect, the answer of the garnishee fully authorises the decree which the district court rendered in this case.

I. I have looked into many of the authorities on this subject; there are cases to be found not materially different from the present one, in which the garnishee has been protected, and I think justly. In New-York, 5 *John.* 102, where the debtor plead in abatement, that an attachment had been previously levied in Maryland, at the suit of a creditor of the plaintiff, and that he had been summoned as garnishee in it. The court sustained the exception, and ordered the action to

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abate. In a case similarly circumstanced in Massachusetts, 8 *Mass. Rep.* 458, it was decided, that the second suit should stand continued until the result of the first was ascertained.

If the decisions of these courts were of authority here, they would free us from all difficulty in this case; but they are not; and in the absence of any positive rule, the cause must be decided according to equity and justice. *Civil Code, p.* 6, *art.* 21. Taking this principle as a guide, and looking at the facts, we find a person who has committed no fault that I can discover, sued by different creditors, of an individual to whom he is indebted, and placed in a situation in which he runs the risk of being compelled to pay twice. His claim, therefore, to protection is strong, and nothing but positive law can destroy it. If the appellant shewed that he had already paid this money, he could not be compelled to pay it again. If he presented a copy of a judgment in a court of another state, directing him to pay it, I presume there cannot be a doubt but it would be a bar here. If his present situation is one in which both these circumstances may be the result of the pre-

vious proceedings against him, his right to relief is as imperious and as equitable.

There is a well known maxim that may aid us in this investigation, *qui prior est tempore potior est jure*, and this does not, in cases of attachment, apply to the first judgment, for the lien commences with the seizure. The court in Pennsylvania will, no doubt, act on this principle, and I think we should; for we would not permit the act of a garnishee going abroad, and subjecting himself to a recovery in another state, to defeat a privilege which a creditor had acquired by attachment under our law.

II. The answer of the garnishee does not, in my opinion, authorise the order given by the district court. His swearing that it was an illegal attachment that had been taken out in the first suit, ought not to prevent him from holding the effects in his hands to await its final result. For this declaration is nothing more than a matter of opinion; and to make it conclusive, we should be satisfied that the garnishee is a competent judge of a legal question; and that the court before which the attachment was taken out, will not mistake the law. But we doubt the knowlege of the

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appellant, and we cannot be certain that the tribunal before which it is pending, will decide the case correctly.

From the most attentive consideration I have been able to give this case, I think, that both on principles of law and justice, the district court erred in decreeing the garnishee to pay over the money. Time should have been given to await and ascertain the decision of the suit pending in Pennsylvania, before judgment was entered up here.

I conclude, therefore, that the judgment of the district court should be annulled, avoided and reversed, so far as it directs the payment of the money in the garnishee's hands; and that the cause be remanded, with directions to the judge to stay all further proceedings against the garnishee, until the decision of the attachment, pending in Pennsylvania, be ascertained, and that the appellee pay the costs of this appeal.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

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be annulled, avoided and reversed, so far as it directs the payment of the money in the garnishee's hands; and that the cause be remanded, with directions to the judge to stay all further proceedings against the garnishee, until the decision of the attachment, pending in Pennsylvania, be ascertained, and that the appellee pay the costs of this appeal.

BERNARD & AL vs. *VIGNAUD*, *ante* 482.

Rehearing denied.

Seghers, on an application for a rehearing. This court has determined that the testimony of Fouque ought not to be rejected, on account of his affinity. To this decision the plaintiffs respectfully submit. But there are two other grounds of exclusion, on which they beg leave to call the attention of the court. The first, that Fouque is the vendor of the slaves on which they have a lien, and that therefore is excluded from being a witness in the cause. *Partida* 3, *tit.* 16, *l.* 19. This law stands unrepealed, and the point was never controverted by the adverse counsel. The second ground, is the liability of the witness to the costs of the suit. *Phillips' Evid.* 46.

It is true that the court have given it as

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their opinion, that the interest of the witness was too remote to affect his admissibility. But it is humbly conceived, that this remoteness relates only to the community between the defendant and his wife, daughter of the witness, and to the eventual right of the latter, to inherit under that community, one half of the property in contest.

Certainly the court did not intend to include in this remoteness, the interest of the witness as the vendor, nor his liability to the costs. To his interest as vendor it has been objected, that he would be equally liable to the defendant as to the plaintiffs. I leave it to the court to determine, whether such a distinction can dispense from the strict application of a positive law, whose context admits of none.

I believe I have established the liability of the witness to the costs in my arguments. This liability has never been seriously controverted: the main objection raised against it by the defendant's counsel was, that it ought to have been pleaded at the trial in the court below, when it would have been in the defendant's power to execute a release, and thereby to remove the liability. And here I beg leave

to turn the attention of the court to the bill of exceptions itself; it will easily be found in the record as there is but one. The contents of this bill will convince the court that the only objection raised against the admissibility of the witness, was on account of his being interested in the event of the suit, and that no release was tendered.

The controversy on account of the affinity, grew out of the cause itself, not out of the bill, which therefore stands still undecided upon by this court. The liability of a witness to the costs of the action, or to any part thereof, is a ground of exclusion too well known in the rules of evidence, to require any further elucidation.

I expect that the court, on re-examination of the cause, on the point of this liability, will find that the judge *a quo* acted correctly in rejecting the witness. I therefore confidently hope, that the plaintiffs will not be denied a re-examination of the cause on this point.—Were it otherwise, I would then beg leave to observe, that the court cannot stop there; for if they will take the trouble of reading the final judgment of the court below, they will find that it has been rendered in favour of the

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defendant. Now, if I am right in my view of the case, a judgment in his favour can certainly not be reversed on a bill of exceptions taken by him, and for his sole benefit; nor would the court take upon themselves to affirm that judgment, to the prejudice of the plaintiffs and appellants, without inquiring into the merits of the cause.

PORTER, J. The plaintiffs, by a petition for a rehearing, have again called the attention of the court to this case.

They complain that the cause has been sent back for a new trial, on an exception taken by the party who succeeded in the inferior court, without any opinion being expressed on its merits. But I think we did express an opinion on the merits, and that in the strongest possible way; for if we had thought with the district court, that the facts, as they appear on the record, authorised judgment for the defendant, we would not have done so vain and useless a thing, as to have remanded the cause for a new trial, to get up testimony which the party did not want.

They also complain that the court took no notice of their objection; that the witness was a vendor of the slaves, and responsible for

the costs. I have looked again into the record, with the intention of delivering an opinion on the point, but I find the objection was taken before the inferior court, in such a manner that we are not authorised to consider the incompetency of the witness on these grounds.

The bill of exceptions merely states, that Fouque, father-in-law of the defendant, was offered as a witness, and that the defendant objected to him on the ground of interest.

The rule on this subject is very clear, and I had supposed, was perfectly understood in practice. It is the duty of a party objecting to the introduction of a witness, not merely to state that he cannot be permitted to testify, but to declare why he is incompetent. This is required, that his adversary may have an opportunity of removing the objection. There are many cases which shew how strictly this rule is enforced. 3 *John.* 558. 4 *ib.* 467. 8 *ib.* 507. 3 *Dallas*, 422. In the language used in one of these cases, the party excepting, must lay his finger on the points which might arise either in admitting or rejecting testimony.

To object to a witness, because he is inter-

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ested, is doing little more than to say that he is not a good witness. The nature of the interest should be stated, in order that the adversary may not be entrapped by an objection so general, or left in ignorance of the real ground on which his incompetency is alleged, until it is too late, by a release, or otherwise, to restore it.

This case will illustrate the correctness of that rule, and the propriety of enforcing it; for the expressions used in the bill of exceptions, satisfy me that the objection was taken to the interest, as father-in-law. But if I am mistaken in this, I am clear he ought to have stated the particular grounds of interest.

I think, therefore, the rehearing should be refused.

MARTIN, J. My opinion is still the same.

MATHEWS, J. I concur in the opinion of judge Porter.

REHEARING DENIED.

A licensed attorney cannot be called on for his powers as a matter of course

If a partner sets up an adverse right, the co-partner may have a writ of sequestration.

JOHNSON & AL. vs. *BRANDT & AL.*

APPEAL from the court of the first district.

PORTER, J. The first question to be decided in this cause is, whether an attorney and

counsellor, duly licensed to practise in the courts of this state, can be compelled to exhibit his authority for instituting an action at law.

This point has been already decided, 9 *Martin*, 88, *Hayes* vs. *Cuney*, and I think correctly. It was there held, that the court could not presume, that any gentleman of the profession, would commence a suit unless duly empowered to do so; and that they would not require him to produce the power under which he acted, unless on a suggestion, supported by affidavit, that such power was wanting. That course was not pursued here, and I therefore think that the district court erred in requiring the attorney to shew under what authority he acted.

The next question is, whether a proper case was shewn to justify an order of sequestration?

This suit is instituted by certain persons, partners under the late firm of John Brandt & Co. against their former co-partners, charging them with the fraudulent management of the estate; accusing them of an intention to embezzle the common effects, alleging that since the dissolution of the firm they had

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taken the whole of the property into their hands, and had neglected to apply it to the payment of the debts.

Under this statement, which for the decision of this cause, must be taken as true, I think a proper case was made for the judicial deposit. Partners are joint owners of the property belonging to the partnership, and have each an equal right to take it into possession; if that is refused, and an adverse right set up to it, the very case is presented, when, according to law, a sequestration should be ordered. *Civil Code*, 418, *art.* 42.

If the partnership is considered dissolved, and the defendants, as agents for the late firm, the case is still stronger; for they have no authority to keep the common effects in their hands, without the consent of those to whom these effects belong.

I think, therefore, that the order made by the district judge, quashing the sequestration, should be reversed, and that this cause be remanded, with directions to proceed in it according to law, and that the defendants and appellees pay the cost of this appeal.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the order of the district court be set aside, and the case remanded, with directions to the judge to proceed according to law; the cost of the appeal to be borne by the appellees.

Grayson for the plaintiffs, *Livermore* for defendants.

WARD vs. *BRANDT & AL.*

When the respite is granted, the stay of proceedings, which is ceded, cannot operate as a bar to an action for the breach of the conditions on which the respite was granted.

APPEAL from the court of the first district.

PORTER, J. This appeal is taken from an order of the inferior court, discharging one of the defendants out of custody of the sheriff. A forced surrender has been since decreed against the firm of Brandt & Co., and the principal object in deciding this cause is, to ascertain on whom the costs must fall.

The judge directed the discharge, on the ground that the order for a stay of proceedings, granted at the time the defendants applied for a respite, was yet in force, and that no suit could be commenced against them until it was set aside.

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The record in the suit of *Brandt & Co.* vs. *their creditors*, which comes up with and makes a part of the proceedings in this case, shews, that on the 28th day of December, 1819, a respite of one, two, and three years was granted to the appellees, and that on the 3d day of January, 1821, the present action was instituted.

The stay of proceedings granted on this application for a respite, was to enable the party applying, to ascertain whether his creditors would accord it, and to prevent any preference being obtained by judgment, or otherwise, during the deliberations. But as soon as the respite was granted, the order had its legal effect, and it cannot be used as a defence in this suit, or operate as a bar to an action, for a breach of the condition on which the creditors extended this indulgence.

I do not enter into the question, whether on the debtor's failure to meet the first instalment the whole of the debt can be demanded of him, because that would be trying the merits on an interlocutory motion, which, in my opinion, cannot be done.

I am therefore of opinion, that the order

granted by the district court, should be set aside and reversed, and that this cause be remanded, with directions to the judge *a qua* to proceed in the same according to law, and that the defendants and appellee pay the costs of this appeal.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the order of the district court be set aside, and the case remanded, with directions to the judge to proceed according to law, the costs of the appeal to be borne by the appellee.

Grayson for the plaintiff, *Livermore* for the defendants.

HEPBURN vs. *TOLEDANO.*

When the maker of, dated at N.-Orleans, resides in another state, it is sufficient to demand payment at the place where it purports to be executed.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. This is an action against the indorser of a promissory note, and the defence set up, is want of demand on the maker. The

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statement of facts shews, that the note was dated in New-Orleans, but not made payable there, and that the drawer resided in Kentucky at the time of the protest, and does so now.

The only question which this case presents, is whether the holder of the note was obliged to go out of the state to demand payment.

There is some difficulty as to the place where demand is to be made, when the maker of a note or acceptor of a bill has been a resident of the state, and before the time of payment, has changed his domicil; but if he lives in another country, the indorsees cannot be presumed to know his residence, and all that the law requires of the holder is due diligence at that place where the note is drawn. Thus, in the case cited by the appellant, 14 *John.* 116, it is stated by the court to have been previously decided, that where a note was dated at Albany, and the drawer of it afterwards removed to Canada, that the demand where it was drawn was sufficient to charge the indorser. *Chitty on Bills*, 335, (edit. 1821.)

I am of opinion, that the demand was properly made in this case, and that the judgment

of the parish court should be affirmed with costs.

MARTIN, J. I concur in the opinion of judge Porter.

MATHEWS, J. I do likewise.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Grymes and *Canonge* for the plaintiff, *Hennen* for the defendant.

MITCHEL vs. *JEWEL.*

APPEAL from the court of the fourth district.

The judge *a quo* cannot, after the record comes up, certify facts, which make part of the statement.

It is not his province to certify what transpires during the trial.

Any admission which it is important to preserve must be put on the record.

This case was determined in February term, 1821, but a rehearing was afterwards obtained. The first opinion was delivered by judge Porter, as follows:—

This suit was brought on the allegation of redhibitory defects in property, constituted in dower by the defendant, on his daughter, wife of the plaintiff. The cause was submitted to a jury, who found for the defendant. There was judgment accordingly, and the plaintiff appealed.

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When the cause came first before the court, it appeared, by the record, that one Jean Filiol had been sworn as a witness. His testimony not appearing in the statement of evidence sent up, the plaintiff and appellant, by his counsel, suggested diminution in the record, and prayed a *certiorari*, directed to the judge of the court before whom the cause was tried, to send up the said testimony, or if the same was not reduced to writing, to certify the reason why it was not.

This *certiorari* issued as prayed for, and the judge has made his return, stating, that the testimony of said witness was quite immaterial as to the points in issue, and that the parties had waved the necessity of reducing it to writing.

On this return, a question of some importance has been agitated, and it is now insisted, that said return does not supply the defects of the record, because it makes a part of the statement of facts, and that the judge must make out that statement before judgment signed.

The decision of this question must turn on our statutes, which regulate the practice in bringing before this court, the facts on which the cause has been decided below.

If this was a case, coming within the provisions of the act of 1817, which authorises the judge to certify the record whenever the facts appear by the written documents filed, we should hold, as we have already done, in the case of *Franklin* vs. *Kimball's executors*, 5 *Martin*, 666, that as that act fixes no particular time within which the judge may certify, he may do so at any time in his discretion, as long as his memory serves him.

But this is not a case of that kind; it is one where the facts do not consist of written documents, but, in a great measure, of oral testimony. And where the judge is called on to complete the record, by supplying a defect in the statement of facts, and which statement he is authorised alone to make, under the act establishing the practice of this court, passed the 10th of February, 1813, *Martin's Digest*, *vol.* 1, *p.* 442. It has been already decided in the case of the *syndics of Hellis* vs. *Asselvo*, 3 *Martin*, 204, that this statement must be made out before judgment; and that decision was predicated, as well on the particular wording of the statute, as upon the evident intention of the legislator, and the evils which must ensue from any other construction.

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It was endeavoured in argument, to distinguish this case from that where the judge makes out a statement of facts after judgment, by shewing, that here he did not certify up what evidence was given, he only returned up the reasons why that evidence was not taken down and sent up; and that reason he states to be, that the parties agreed, that the testimony of the witness should be disregarded, and not reduced to writing. This is denied by one of them, who further insists, that as the judge is inhibited from making out a statement unless he does it before judgment signed, that he cannot be permitted now to certify facts, which must, if received, make part of that statement.

This objection, we think, well taken, and the distinction which the plaintiff endeavours to make, between this and ordinary cases, unsound. The law requires the evidence given on the trial to be taken down in writing, and certified up whenever the parties resort to that mode of bringing facts before this court. If part of this comes here, the want of the rest can be dispensed with only by consent. That consent, which stands in place of the evidence, should be made out

before judgment. And there is just as much danger, perhaps more, to permit a judge to make out from memory months after the trial, statements in respect to the admissions of the parties, that they did not want the evidence; as there would be, to permit him to make out the evidence itself.

It is clear, therefore, that the provisions of the statute, in respect to bringing up the facts in the cause, has not been pursued; and on general principles, we do not think, a judge has any authority to certify what transpired in his court during the trial. It is not one of his duties. The admission of the parties should have been part of record, and then the clerk could have furnished a copy of it in the usual way.

It was urged, that if the objection here taken, should be sustained, either party in a cause could, by coming in and suggesting diminution of the record on affidavit, always obtain a dismissal of the appeal, if any agreement took place during the process of the trial, which was not reduced to writing. Here, however, it appeared by the record, that the witness was sworn; and if it was necessary to decide on what is not now before us, a clear

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distinction could be shewn between this case and that supposed in argument.

Nor will the principle now established, prevent this court from hereafter having a record amended when it becomes necessary to do so. When the record is defective, from not sending up what legally makes a part of it below, the defect may be cured. But when the application is to have the record completed, by adding to it things which do not make a part of it in the court which tried the cause, then the question recurs, can this addition be legally made, at the period of the application? In the case of *Hooper* vs. *Martineau*, 5 *Martin*, 669, the court, when a *certiorari* was applied for, to send up testimony taken in the court below (although the point was not made before them) cautiously limited the order to evidence taken and reduced to writing during the trial of the cause. On the whole, we have no doubt but the law demands, and that the safety of the suitors in our court requires, that, whenever the facts consist of oral testimony, we should rigidly enforce the principles already laid down in the case of *syndics of Hellis* vs. *Asselvo*.— We regret the necessity which compels us to

turn off the appellant on a point not perhaps connected with the merits of the cause. But it would be a subject of much more regret, if from any feeling, we deprived either party of rights, whether technical or otherwise, which the law assures them.

It is therefore ordered, adjudged and decreed, that this appeal be dismissed, and that the costs thereof be paid by the appellant.

The case was heard anew at this term, and judgment given as follows:—

Although in doubtful cases the supreme court yield up their conclusion to those of the jury, in a matter of fact, they cannot do so when the evidence produces an entirely different conviction.

PORTER, J. On the 14th day of December, 1819, a contract of marriage was entered into between the plaintiff in this cause, and the daughter of the defendant; by this contract, three slaves, estimated at the sum of $2650, were given by the father in dowry, and transferred to Mitchel at that price.

On the 20th of January, 1820, the marriage took place, and on the 13th of April following, this suit was commenced, alleging that the said slaves were affected with redhibitory vices; that it was known to the defendant they were so at the time he alienated them; and that they were given with a view of cheating and defrauding the plaintiff. The peti-

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tion concludes with a prayer, that the transfer of the three slaves be annulled and set aside, and that the defendant pay the sum of $3500.

The answer denies these allegations, and the plaintiff's right to sue. The cause was submitted to a jury. There was judgment for the defendant and the plaintiff appealed.

This cause has been already heard here, and it appearing to the court on the view which they then took of the subject, that the record was defective, the appeal was dismissed. A rehearing has been granted and the whole case is again submitted to us.

As to the correctness of the principles contained in the opinion then delivered, I do not entertain a doubt. I still think, that if a witness has been sworn and examined on the trial, his testimony ought to be sent up. That if the parties by consent have waved this, that consent should appear on the record, or make a part of the statement of facts made out according to law; and that the judge cannot, after judgment is signed below, either make out this evidence, or furnish the reasons why it was not taken down. As it is unnecessary to go again into the subject, I refer to the opinion already delivered, as conveying

fully my ideas on the point there examined and decided on.

But, on further consideration, a doubt was excited in the mind of the court, if this case came within the rule there laid down. And the difficulty felt, and the reason for granting a rehearing was, whether enough did not appear on the record to shew that the parties consented to wave the testimony.

The trial was had on the 26th of May; on that day the judge made out, and on the next, filed a statement of the evidence, with the following certificate: "I certify the foregoing facts as all the evidence taken in court, on the trial of this cause." 27th, the following consent was put on record: "The parties in this cause agree that the judge certify the record as containing the facts in the case."— When the cause was formerly decided, I thought that these expressions amounted to nothing more than an agreement, that the judge should certify the proceedings instead of the clerk, as the latter is one of the parties to this suit. But more mature reflection has convinced me that sufficient weight was not given to this consent, and that as the oral testimony taken down by the judge, and de-

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clared by him to contain it all, made a part of the record at the time the parties came to this agreement; the admission that he should certify the record, as containing the facts, must be considered to relate to that statement, and is a confession that it was a correct one.

This objection removed, we now come to the merits of the case; they depend on the extent and weight of the evidence taken on the trial, to establish the existence of redhibitory defects in the slaves already mentioned.

The substance of the testimony, is as follows:—

In relation to the negro Tom. Rickenberger swears, that the defendant bought him in Charleston, that the witness refused to buy him, that the vendor sold him for every thing that was bad, and addicted to every vice; and that he was purchased out of a place called the sugar house, where run-away and bad negroes are confined. He further testifies, that Jewel knew the slave was addicted to robbery.

Gould, another witness, proves, that he heard Jewel say that this slave was addicted to robbery. The defendant, to meet this, relies,

first,—on the testimony of the last witness, who was his clerk, familiar with his affairs, and intimate in his family; and who swears, that the reason he had for believing Tom a robber, was because the family stated he had stolen fowls, and had been concerned in the theft of a sheep belonging to his master, Jewel; and that he knows of no other instance of the slave having committed robbery.

Secondly,—On the evidence of Tournois, one of the appraisers, that for several causes, such as stealing, he has put negroes in irons, and that he would give $2000 for slaves he has seen ironed.

Now, great as my disposition is to respect the verdict of a jury, in matters of fact, and in case of doubt, to yield up my conclusions to theirs; yet, so long as the law gives a legal right to parties in a suit, to demand the opinion of this court, on cases tried in this way, they must obtain it. And if the evidence produces an entirely different conviction on our minds, from that which it has done on those of the jury, we must of necessity so pronounce it.

The evidence just detailed is of that kind. It makes out, I think, clearly, and beyond dis-

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pute, the vice complained of. The declaration of Rickenberger, that the person from whom the defendant purchased this slave, sold him as one of the worst character; and the testimony of Gould, another witness, that Jewel acknowleged the negro was addicted to robbery, is as strong proof as any case of this description could well furnish; taken with the other facts detailed, it is insurmountable; and is in no respect, weakened by the declaration of the witness, detailing the particular facts, related by the family, as a ground for his own belief. If there had not been more within the knowlege of the first vendor, and the present defendant, they would not have made the declarations which it has been proved, proceeded from them.

As to the negro Jack, the following evidence was given—Gould, the witness already mentioned, knows that the slave was in irons for having runaway; when the appraisers under the marriage contract, came to estimate him, they were taken off; when they went away he was again ironed. It is within the witness's knowlege that the defendant knew the slave had run-away.

O'Neil, the overseer of Jewel, proved that

the negro was put in irons one month after he arrived from Charleston; he was treated so for having absented himself from work for a few days. From that time, until the estimation already spoken of, these irons were not taken off.

Several witnesses established, that the three negroes mentioned in the marriage contract, have run-away frequently since they came into the possession of the plaintiff.

This evidence is rebutted by the following proof:—

Gould declares, he never knew this slave to run-away more than once. O'Neil says, that he was put in irons for absenting himself, but does not think he was off the plantation. It was principally on account of his sore eyes, and that he was too much pushed, that he ran-away. That he considered the negro too sick to work. When he found him he had his basket and about 20lbs. of cotton. Does not consider him addicted to run-away, but an idle fellow. He never run-away but once. The chain put on him was an iron plow-trace, and he could go, and did go, on any part of the plantation.

The credit of this last witness has been

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assailed, but, in my opinion, unsuccessfully. He was proved on the trial to be an honest, correct man; and the jury has sanctioned that opinion by their verdict.

I cannot, from this testimony, gather, that this slave ever ran-away but once antecedently to the time he came into Mitchel's possession. Indeed, it is not distinctly proved that he was off the plantation; and the overseer assigns as a cause for absence, sore eyes, and being too hard pushed. This, I think, is not sufficient to establish a habit of running away; it is proving but one act of absence, and accounting for it. In the case of *André* vs. *Foy*, to which our attention has been directed, the negro Boucaud, had been committed to jail once as a run-away, and ran-away twice within a few days after the purchase. The court there held, that these facts, when connected with each other, raised a presumption that the habit existed anterior to the sale. Here, however, there is not any fact of sufficient importance to couple with the subsequent elopement after the slave came into the plaintiff's hands. Another feature of that case was, that a jury had fortified the presumption otherwise flowing from the evidence, by

their verdict. Here they have negatived it, and I do not feel myself authorised to disturb their finding.

In relation to those facts, which, though not proof in themselves of the vice, it is insisted, go far in support of the other evidence. I would remark, that very little can be inferred from the slave being in irons. They are often placed on as a punishment; and in this case, they were not of that description which would have prevented him from absconding, if he had wished to leave his work a second time.

The circumstance of all the slaves leaving Mitchel after he had got them, though only one is charged with having the habit of a run-away before, does not give much additional weight, in my mind, to the claim of the plaintiff. This habit must be proved to exist at the time of the sale. Subsequent acts, to be sure, furnish some clue to ascertain previous habits, but they are not very strong proof, and for an obvious reason, such testimony should be received with great caution. For without being understood to make the remark, in relation to the present defendant, it is clear, that if much importance is attach-

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ed, in general, to such proof, any purchaser dissatisfied with his acquisition, may, by his treatment to the slaves bought, force them to run off, and thus, by his own act, make evidence for himself.

It is possible I may be mistaken in this view of the subject, and that the evidence is entitled to more weight in establishing a redhibitory vice in this slave, than after a most attentive consideration, I have been able to give it. But of one thing I am very certain, it does not so preponderate in favour of the appellant, as, in my opinion, to justify this court in reversing the decision which a jury has pronounced on it.

In regard to the wench Jenny, I deem it sufficient to remark, that I cannot discover, from any thing appearing on the record, that she was affected with a redhibitory vice or defect at the time of the transfer.

Evidence was taken to shew that these were the worst slaves the father-in-law owned; that he stated nothing to the estimators respecting their character; that if the fact of Jack being in irons, had been communicated, he would not have been esteemed at so high a price.

On the other hand, proof was adduced that Mitchel knew the character of the slaves perfectly well, that he had seen Jack in irons, that he was present at the estimation, that he made no objection to it, and remained silent as to their defects.

All this has little to do with the case, which is confined to the enquiry, whether or not there existed redhibitory vices in this property at the time of the transfer? I think these defects have been proved to exist in the negro Tom, and not in the others; and I have gone more into detail in the case, than is usual, because I do not know that this opinion will be that of the court.

On the whole, the judgment of the district court should be annulled, avoided and reversed, and this court proceeding to give such decree as the district court should have rendered, ought, in my opinion, to order, adjudge and decree, that the transfer of the negro Tom, to the plaintiff, made by the act of marriage contract between the appellant and his wife, on the 14th of December, 1819, be annulled; that the plaintiff do recover of the defendant, eight hundred and fifty dollars, with costs of suit in this court and the court

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below; to be paid by defendant on the delivery or tender of said slave, free from any incumbrance, mortgage, or privilege (other than the marriage contract) created on said slave by said Mitchel. And if on the tender or delivery of said slave, accompanied by a certificate from the register of mortgages of this city, and the parish judge of the parish where the plaintiff resides, that the said slave is free from incumbrance, mortgage or privilege, other than the marriage contract, the said Jewel shall fail to pay over to the said Mitchel the sum of money aforesaid, that then execution do issue from the court *a quo* against the said defendant, for the sum of eight hundred and fifty dollars, the costs incurred by this appeal and those in the district court.

MARTIN, J. I find no difficulty in concurring with any part of the opinion just pronounced, except that which refers to the negro Jack. The case of *Macarty* vs. *Bagneres*, appeared to be so similar, that I at first thought the same decision ought to take place here; but on close examination, I perceive a considerable difference.

The slave sold to Macarty was shewn to

have run-away once before the sale, and did run-away immediately after. But in the present case Jack did not run-away with the intention of escaping from his master; but lurked about for some days on the skirts of the plantation, to avoid working. His being put in irons, is presented to us, on the one side, as a measure deemed essential to prevent an escape; on the other, as a common domestic punishment. Bagneres kept his negro five months in jail, till the very moment of delivery, after the sale. So long a detention, and the consequent loss of his services, in the meanwhile, manifested the master's consciousness that the slave would escape as soon as the opportunity offered.

Notwithstanding all this, the circumstance of the irons being only knocked off when the appraisers arrived, and instantly replaced on their return, manifests perhaps an intention of placing him before them in a more favourable view than candour allowed; but the case comes up fortified, by the finding of the jury in favour of the defendant. This turns the scales against the plaintiff. I conclude that he ought to be relieved in respect of the negro Tom, only.

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MATHEWS, J. I have attentively examined the opinion of the junior judge of the court; and am sorry to be compelled, by my view of the case, to dissent from the conclusion therein expressed, as to the effect of the consent of the parties, in relation to the manner in which the judge of the court *a quo* should certify the record as containing all the facts in the cause. I am still of opinion, that by this consent, nothing more was intended than to substitute the certificate of the judge for that of the clerk, who was a party to the suit, and from that circumstance, ought not, in pursuance of common prudence, as exercised in the affairs of men, to have been allowed to make out and certify the record, without special attention either by the opposite party or by the judge. In ordinary cases, it is the duty of the clerk of the court to certify all matters which may be recorded in the trial of any cause.

According to the act of 1817, the testimony of witnesses must be reduced to writing by the clerk, becomes a part of the record, and is to be sent up to the supreme court, to serve as a statement of facts, whenever required by either of the parties litigant. This law is in-

tended to give to suitors a choice as to the manner in which the facts of a cause shall be brought before the appellate court, either in pursuance of the mode therein prescribed, or in conformity with the provisions of the act of 1813. I am ready to admit that the parties to a suit, may, by consent, wave the necessity of transmitting the whole testimony as taken down in a cause, and substitute in its place, a statement of facts as required by the former law; but their intention ought to be most clear and manifest by the expressions of such consent, before depriving them of the benefits arising from an examination of the whole testimony in both courts. In the present case, the consent of parties, that the judge should certify the record, as containing all facts in the case, does not, in my opinion, amount to an agreement to take the judge's statement as a substitute for the evidence, which it seems was required to be taken down in writing. It has been decided by this court, that in all cases, wherein the testimony is reduced to writing, and sent up on the record, we would presume that it had all been taken down and regularly sent up, until the contrary should be shewn: but it is here shewn, that a witness was sworn and

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examined, and his testimony does not appear, nor does any consent appear on the record, by which the parties have waved the necessity of reducing it to writing, and handing it to this court. This view of the subject leaves the reasoning of the court in our former judgment, in its full strength and vigour, which was then, and still is, satisfactory to my mind.—I therefore conclude, that the first judgment ought not to be disturbed, unless the justice of the case require that the case should be remanded.

It has been the uniform practice of this court, in all cases, when the facts were not brought fully before it (as required by law) either to dismiss the appeal, or to remand the cause for a new trial. The latter course of proceeding has always been pursued, when it was believed that the justice of the case, as exhibited by the record, would authorise it; but I do not think that the present belongs to that class of cases.

Mitchel in *propriâ personâ*, *Livingston* and *Carleton* for the defendant.